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EDITOR'S NOTE

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o. 85-5-CFX
tatus: GRANTED

ocketed:
uly 3, 1985

ee also:
84-1779

Title: Pennsylvania, et al., Petitioners
v.
Delaware Valley Citizens' Council for Clean Air, et al.

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Krill, John P., Waldman, Jay C.

Counsel for respondent: Solicitor General, Crawford, James D.

ntry	Date	Note	Proceedings and Orders
1	Jul 3 1985	G	Petition for writ of certiorari filed.
2	Jul 11 1985		Waiver of right of respondent United States to respond filed.
3	Jul 24 1985		DISTRIBUTED. September 30, 1985
4	Aug 20 1985	X	Brief of respondent DE Valley Citizens' Council in opposition filed.
5	Oct 7 1985		Petition GRANTED. **********
6	Nov 4 1985		Record filed.
7	Nov 4 1985		Certified copy of original appendix, Volumes I thru III and partial proceedings received.
12	Nov 26 1985		Joint appendix filed.
13	Dec 2 1985		Brief of petitioners Pennsylvania, et al. filed.
14	Dec 2 1985		Brief of respondent United States supporting the petitioners filed.
15	Dec 10 1985	G	Motion of the Solicitor General for divided argument filed.
16	Dec 2 1985		Brief amicus curiae of Arizona, et al. filed.
17	Dec 11 1985		Record filed.
19	Dec 20 1985		Order extending time to file brief of responcent on the merits until January 11, 1986.
20	Jan 7 1986		SET FOR ARGUMENT, Monday, March 3, 1986. (2nd case)
21	Jan 13 1986		Motion of the Solicitor General for divided argument GRANTED.
22	Jan 11 1986		Brief of respondent DE Valley Citizens' Council filed.
23	Jan 23 1986		CIRCULATED.
24	Feb 24 1986	X	Reply brief of petitioners Pennsylvania, et al. filed.
25	Mar 3 1986		ARGUED.
26	Jul 2 1986		JUDGMENT AFFIRMED IN PART; REVERSED IN PART; and REMANDED to the Court of Appeals for further proceedings in conformity with the opinion of this Court. Justice White delivered the opinion of the Court, in which Burger, C.J., and Powell, Rehnquist, Stevens, and O'Connor, JJ., joined, and in Parts I and II of which Brennan, Marshall, and Blackmun, JJ., joined. Blackmun, J., filed an opinion concurring in part and dissenting in part, in which Marshall, J., joined, and in Part II of which Brennan, J., joined. An order will issue restoring the case to the argument calendar insofar as it raises the question whether attorney's fees chargeable to a losing defendant under the Clean Water

o. 85-5-CFX

ntry	Date	Note	Proceedings and Orders
			Act and the comparable statutes may be enhanced based on the risk of loss, and if so, to what extent.
27	Jul 7 1986		The case is restored to the calendar for reargument insofar as it poses the issue whether a presumptively
28	Jul 7 1986		reasonable attorneys' fee award under Section 304(d) of the Clean Air Act, 42 U.S.C. 7604(d), may be
29	Jul 7 1986		"multiplied" or otherwise enhanced to reflect the risk that plaintiffs might not have prevailed and, therefore,
30	Jul 7 1986		might have obtained from defendants no attorneys' fees at all.
31	Jul 30 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
32	Jul 28 1986		SET FOR REARGUMENT. Wednesday, October 15, 1986. (4th case) (1 hour).
33	Aug 19 1986		Judgment issued.
34	Aug 21 1986	X	Supplemental brief of petitioners Pennsylvania, et al. filed.
35	Sep 3 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
36	Sep 23 1986	X	Brief amicus curiae of American Bar Assn. filed.
37	Sep 24 1986	X	Supplemental brief of respondent
38	Sep 23 1986	X	Brief amicus curiae of Joseph Bonjorno, et al. filed.
39	Sep 23 1986	X	Brief amicus curiae of Twelve Small Private Civil Rights Law Firms filed.
40	Oct 8 1986	X	Reply brief of petitioner Pennsylvania, et al. filed.
41	Oct 15 1986		REARGUED.

PETITION FOR WRIT OF CERTIORARI

85- 5

Office Supreme Court U S
FILED
JUL 3 1985
ALEXANDER L. STEVAS,
CLERK

No.

In the Supreme Court of the United States

October Term, 1984

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners

vs.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR

[redacted],
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAY C. WALDMAN
General Counsel
Office of General Counsel
SPENCER A. MANTHORPE
Chief Counsel
Department of Transportation
JOHN W. CARROLL
Acting Chief Counsel
Department of Environmental Resources
JOHN M. HRUBOVCAK
Assistant Counsel
Department of Transportation
By: JOHN P. KRILL
Deputy General Counsel
Commonwealth of Pennsylvania
(Counsel of Record)
Attorneys for Petitioners

Office of General Counsel
Commonwealth of Pennsylvania
Post Office Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

EDITOR'S NOTE

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Circuit Court's affirmance of the award of multipliers of 2 and 4 by the District Court, prior to the decision of this Court in *Blum v. Stenson,* is in clear conflict with *Blum v. Stenson* because the District Court relied on improper factors, such as new and novel issues, and used conclusory language, completely failing to articulate any factual justification for the enormous multipliers awarded?

2. Whether likelihood of success may be used as a factor in the multiplier for an award of attorney's fees, even in cases where the losing party essentially bore the burden of proof and persuasion?

3. Whether 42 U.S.C. §7604 (d) authorizes attorney fees for non-litigation activities such as submitting comments on draft regulations and providing comments at a public hearing, which are available to all citizens as a means of communicating with government?

TABLE OF PARTIES

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR; AMERICAN LUNG ASSOCIATION FOR PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; KEVIN QUINN, KAYSI FARRELL, RUTH G. WEISS; JOHN KLINKNER, ELIZABETH S. BIEZ; MONA SHULMAN,

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA; WILLIAM T. SHERLOCK, Individually and as Secretary of the Pennsylvania Department of Transportation; MAURICE K. GODDARD, Individually and as Secretary of the Pennsylvania Department of Environmental Resources,

Defendants

(D.C. Civil No. 76-2068)

— —

UNITED STATES OF AMERICA,

Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA, the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources,

Defendants

(D.C. Civil No. 77-0619)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, the Commonwealth of Pennsylvania, Thomas D. Larson, the Pennsylvania Secretary of Transportation, and Nicholas DeBenedictis, the Pennsylvania Secretary of Environmental Resources, hereby respectfully petition this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on May 14, 1985.

I. OPINIONS OF THE COURTS BELOW

The opinion of the District Court dated February 24, 1984, awarding attorney fees with multipliers of 2 and 4, is not reported. This opinion is reproduced in the Appendix at 1a to 45a.

On May 14, 1985, the Court of Appeals affirmed the opinion of the District Court. This opinion is printed in the Appendix at 46a to 70a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

III. STATUTORY PROVISION INVOLVED

1. Clean Air Act, §304 (d), as amended, 42 U.S.C. §7604 (d) (1982) (formerly codified at 42 U.S.C. §1857h-2 (d)):

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

IV. STATEMENT OF THE CASE

The Petition for Certiorari is from an order awarding attorney fees to Delaware Valley Citizens' Council for Clean Air (hereinafter "Delaware Valley") in the amount of $216,488.03, which includes multipliers of 2 and 4, for work involving the Pennsylvania vehicle emission inspection and maintenance program (hereinafter "I/M program"). This work was subsequent to the entry of a consent decree for which attorneys' fees had already been paid.

Delaware Valley and the United States sued the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation, and the Secretary of the Pennsylvania Department of Environmental Resources (hereinafter "state officials") to force them to implement an I/M program in certain counties in Pennsylvania. Such a program involves establishing inspection stations for checking the tailpipe emission (hydrocarbon and carbon monoxide) of vehicles by means of an analyzer, and requiring that vehicles which exceed a specified level of emissions have repairs performed to reduce emissions to a specified level. In August 1978, a consent decree was signed. The decree provided for the inspection of the exhaust emissions of certain vehicles in ten counties in Pennsylvania under authority of existing state statutes. Attorneys' fees were paid in 1978 and are not involved in this appeal. Subsequent to the decree, other activities have occurred for which Delaware Valley has requested attorney fees.

Specifically, Delaware Valley's attorneys sought attorney fees for work performed from 1979 to 1983. Delaware Valley categorized the work in nine phases. These

nine phases include: (1) filing of a motion to show cause by Delaware Valley which was denied, (2) commenting on draft regulations, (3) negotiating a first modification to the consent decree, (4) opposing a request by state officials to modify the consent decree further, (5) opposing a motion for a stay and a modification of the consent decree and obtaining a finding of contempt and the imposition of sanctions because the General Assembly overrode the veto of the Governor and prohibited the spending of funds for the I/M program, (6) opposing intervention motions, (7) opposing seven highway projects submitted as exemptions from the funding limitations ordered by the District Court, (8) vacating of sanctions, and (9) filing of an amicus brief before a state court in a related case and participating in public hearings for a revision of the State Implementation Plan relating to the I/M program.

The state officials contested the award of any multiplier, the award of a lodestar for certain work and fees to a member of the plaintiff group. By order dated February 24, 1984, the District Court awarded attorney fees. With Judge Becker dissenting from the award of the multiplier, based on this Court's opinion in *Blum v. Stenson,* U.S. , 104 S.Ct. 1541 (1984), the Court of Appeals affirmed the District Court on May 14, 1985. On June 7, 1985, the Court of Appeals, on application of state officials, granted a stay of the mandate.

Most relevant to this certiorari petition, the courts below awarded multipliers of 2 and 4, amounting to $124,-199.50, based on factors such as new and novel issues, which are improper under *Blum v. Stenson,* and based on conclusory and unsupported statements of the District Court. These multipliers were applied in connection with three phases of work.

First, the District Court awarded $36,711.50 as the lodestar and a multiplier of 2 for a total award of $73,-723.00 based on the following. In mid-1980, the United States designed an improved emission analyzer to be used to test vehicles for emissions in the emission inspection program. The United States in its publications urged states to use the new analyzer and provided for additional time to implement an emission program to allow for manufacturer development time. Upon analysis of this information, negotiations were initiated to modify the consent decree to permit use of the new analyzer, but agreement could not be reached with Delaware Valley. State officials filed a motion to modify the consent decree. Delaware Valley filed a motion to declare state officials in violation of the consent decree and submitted ten pages of requested modifications to the consent decree including stipulated penalties, payment of administrative costs to Delaware Valley and attorney fees. On May 20, 1981, the District Court, without hearing and after requiring parties to continue negotiations, issued an order which refused the state officials' request for an extension of time to use the new analyzer and denied the modifications requested by Delaware Valley. On June 16 the District Court approved an implementation plan submitted by state officials with three modifications. The matter was decided solely on briefs and the decision was affirmed by the Third Circuit Court of Appeals and certiorari was denied. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 674 F.2d 976 (3d Cir.), *cert. denied,* 459 U.S. 905 (1982).

Second, the District Court awarded $27,372.50 as the lodestar and a multiplier of 4 for a total award of $109,-490.00 based on the following. The emission inspection program was continuing with all deadlines being met, in-

cluding establishing a scholastic program to train and certify over 1500 mechanics, certifying numerous stations through Phase I of a two-phase certification process, development of a public information program, development of other phases of the program and defense of the program in state court actions. However, on October 5, 1981, the General Assembly passed legislation, over the veto of the Governor, which prohibited the use of state funds to implement the emission inspection program. Based on that legislative action, state officials filed a motion for a stay and a modification of the consent decree. Delaware Valley filed a motion to declare state officials in contempt, to impose daily fines payable to the court and to Delaware Valley and for attorney fees. On January 22, 1982, the District Court denied the motion of the state officials and found them in contempt, but the District Court denied the remainder of Delaware Valley's motion. The Court imposed its own sanction and prohibited the use of federal funds for transportation projects in ten counties except for projects which were certified by the United States to be for safety or mass transit or related to air quality improvement. The federal certifications would become final unless stayed by the court within a thirty-day period. The Third Circuit affirmed the decision, after granting a stay, and certiorari was denied. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 678 F.2d 470 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982).

Third, the District Court awarded $5,370.50 as the lodestar and a multiplier of 2 for a total award of $10,-741.00 based on the following. In late 1982, pursuant to order of January 22, 1982, seven projects were certified by the United States as projects that would improve safety because they would reduce deaths and accidents or would

improve air quality. The certification documents were provided to the court and to Delaware Valley. On November 9, 1982, the District Court, on the basis of the certified documents of the United States and briefs of the parties, found that five of the projects did not qualify as exemptions under the terms of its order and that two of the projects did qualify as exemptions (71a to 85a).

Finally, the District Court awarded attorney fees for providing comments to draft regulations and for submitting comments at a public hearing. On August 18, 1979, draft regulations for the emission program were published in the Pennsylvania Bulletin for comment by the general public. Delaware Valley and other persons submitted comments. Delaware Valley labeled this as Phase II of the attorney fee petition. The District Court awarded $1,722.50 in attorney fees for this activity.

In 1982, a public hearing was held in Philadelphia by the Environmental Protection Agency to consider modifications to the State Implementation Plan (a general plan to consider emission reductions from a variety of sources). Delaware Valley submitted comments at the public hearing. Delaware Valley also labeled these comments as part of Phase IX in the attorney fee petition. The District Court awarded $1,453.00 in attorney fees for this activity.

State officials filed an appeal from certain aspects of the order of February 24, 1984 and Delaware Valley filed a cross-appeal. The District Court issued an order staying the judgment of February 24, 1984 pending the appeal. On May 14, 1985 the Court of Appeals for the Third Circuit, in a panel decision with Judge Becker, based on the recent opinion of this Court in *Blum v. Stenson,* dissenting from the award of the multiplier, affirmed the order of the District Court (46a to 70a).

V. REASONS FOR GRANTING THE WRIT

A. The Circuit Court's affirmance of the award of multipliers of 2 and 4 by the District Court is in clear conflict with the decision of this Court in Blum v. Stenson, which was issued after the opinion of the District Court and was not available to the District Court, because the District Court relied on improper factors, such as new and novel issues, and used conclusory language, completely failing to articulate any factual justification for the increase.

On March 21, 1984 (approximately one month after the attorney fee decision by the District Court in the present case) this Court decided *Blum v. Stenson,* U.S. , 104 S.Ct. 1541 (1984). This decision effected a fundamental change in the law governing the award of attorney fees.

The district court opinion in *Blum,* which this Court reversed, is remarkably similar to that in the present case. In *Stenson v. Blum,* 512 F. Supp. 680, 685 (S.D.N.Y. 1981), the District Court awarded a multiplier of 50 percent, stating:

> On the facts of this case, I deem an upward adjustment of the lodestar amount appropriate. The quality of representation was high. The litigation was complex. The issues presented were novel, and the undertaking therefore risky. Finally, the outcome was of great benefit to a large class of needy people. All of these factors render an incentive award appropriate. *See Cohen v. West Haven Board of Police Com-*

missioners, supra (factors include risk, complexity, and quality of representation); *Population Services International v. Carey, supra* (social benefits of the action a factor in upward adjustment of lodestar amount); *Beazer v. New York City Transit Authority,* 558 F.2d 97 (2d Cir. 1977) (complexity or risk of loss on the legal issues and benefit to the clients important factors in bonus award).

Plaintiffs request a bonus of 50% of the lodestar amount. Particularly in view of the complexity of the litigation and the benefit to the class, I find such an award appropriate. *See Population Services International v. Carey, supra* (50% bonus awarded); *City of New York v. Darling-Delaware, supra* (bonus awards of 60% to 200% granted); *Blank v. Talley, supra* (50% bonus awarded).

The opinion of the District Court in the present case (which awarded even higher multipliers of 2 and 4 in three short conclusory paragraphs (39a-40a) is no different from that of the district court in *Stenson v. Blum,* which was reversed by this Court. The District Court did not have the benefit of the decision of this Court in *Blum* and its decision is in clear conflict with it.

As did the district court in *Blum,* the District Court, in this case, also referred to new and novel issues in awarding the multiplier (39a). In sharp contrast, however, in *Blum v. Stenson,* U.S. at , 104 S.Ct. at 1549, this Court determined that "[n]either complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award."

In awarding the multiplier, the District Court stated in conclusory manner that the quality of representation was

superior (39a). The District Court never provided any facts for this conclusion. In *Blum,* this Court rejected the use of unsupported conclusions, U.S. , 104 S.Ct. at 1550. The only reference by the District Court to qualify was that the work helped the Court (39a). The purpose of any submission of any memorandum in any court by any attorney is to help the court. The Court of Appeals referred to complexity in regard to quality (68a) and further compounded the error. As held in *Blum,* novelty and complexity are not a basis for the award of the multiplier, because these factors, as well as the time used to prepare briefs for the aid of the court, are reflected in the reasonable number of billable hours and the reasonableness of the hourly rate. U.S. at , 104 S.Ct. at 1548-49.

In addition, this case presents an example of "double counting", which was rejected in *Blum.* The Court of Appeals in this case stated that "[t]he vast bulk of the work was performed by Balter and Lanard, *both inexperienced attorneys*" (62a n. 10) (emphasis added). Nonetheless, it affirmed the District Court's decision to compensate Mr. Balter "at a high hourly rate . . . of $100 per hour" for Phase IV (25a). It also affirmed the District Court's award of a high hourly rate for Phase V, on the basis that the work performed by "an attorney with a high degree of skill" (29a-30a), and affirmed the District Court's award of the same high hourly rate for Phase VII (33a). Finally, it allowed the District Court to justify the upward adjustment on the unsupported conclusion that the work was superior, even after it had already awarded high rates for that work. As in *Blum,* the added upward adjustment of a high hourly rate for inexperienced counsel where high hourly rates had already been awarded is an example of "double counting". U.S. at , 104 S.Ct. at 1549.

The District Court did not refer to any facts in reaching these unsupported conclusions.

In justifying the multiplier, the District Court also appeared to believe that Delaware Valley's counsel had prevailed on questions "where likelihood of success was least" (39a). A consent decree was signed in 1978 and attorney fees were paid for that aspect of the case. Phases IV, V, and VII involved issues where the state officials essentially bore the burden of proof and persuasion. Phase IV involved a motion to modify the decree to extend the implementation date in order to use a new analyzer being developed by the Federal government. In seeking to modify the consent decree, the state officials had the "heavy burden" of proving "exceptional circumstances." *Delaware Valley Citizens' Council, supra,* 674 F.2d at 982. For Phase V, which involved a motion for contempt and a motion to stay and to modify the consent decree, state officials had the burden of meeting the stringent requirements to modify the consent decree. For Phase VII, which involved the District Court's applying its own order, the District Court stated that the state officials had "the burden to prove that each project for which they now seek exemption from the remedy has as its *primary* purpose the safety and the improvement of air quality" (78a). Since the state officials in this case had such a heavy burden to bear in succeeding on the merits, they find it incredible that the Court could state that Delaware Valley's "likelihood of success was least" on these issues (39a). Consequently, from the entry of the initial decree, with the consent of the state officials, until the District Court's last order, Delaware Valley's counsel have enjoyed a significant advantage which made their work less difficult and the fact that they prevailed unremarkable.

Although, in *Blum v. Stenson,* this Court did not consider whether the risk of not being the prevailing party may ever justify an upward adjustment, it did reject the use of unsupported conclusions. U.S. at , 104 S.Ct. at 1550. The District Court in this case made no reference to any evidence from Delaware Valley's counsel to support its conclusions for the simple reason that no relevant facts were alleged in regard to the specific evidence required for the multiplier.

May v. Cooperman, 582 F. Supp. 1458 (D.N.J. 1984), provides major insight on the application of *Blum v. Stenson.* In *May,* a case involving a constitutional challenge, the district court candidly admitted that it would have awarded a multiplier of 25 percent. During consideration of the attorney fee award, however, *Blum* was issued. The district court, which was fortunate to have had *Blum* decided prior to issuing its order, awarded no multiplier, finding that "the *Blum* case effects a fundamental change in the law governing the award of attorneys' fees" and that the reasons advanced by plaintiffs in *May* were the same reasons advanced in *Blum. Id.* at 1462-63.

The conclusory opinion of the district court in the present case is no different from that of the district court in *Blum.* The Court of Appeals provided no further basis for the award of the huge multiplier and, in essence, repeated the unsupported conclusions of the district court.

In *Murray v. Weinberger,* 741 F.2d 1423, 1428 (D.C. Cir. 1984); that court, in applying *Blum v. Stenson,* reversed the award of a multiplier by the district court for the following reason:

> "The district court has a corresponding duty under the statute to explain with particularity why an

> increase in the presumptively reasonable lodestar figure is necessary in order to provide reasonable attorney's fees. In *Blum v. Stenson,* the Supreme Court insisted that the district court fully articulate the justification for any increase of the lodestar. . . ."

The opinion here is inconsistent with *Blum v. Stenson,* is in conflict with the decision of the Court of Appeals for the District of Columbia which correctly applies *Blum v. Stenson,* and, accordingly, must be reversed.

B. **Reliance on the likelihood of success as a factor to be included in the multiplier for an award of attorney's fees, especially where the opposing party essentially bore the burden of proof and persuasion, is in conflict with opinions of other Circuit Courts.**

In *Blum v. Stenson,* this Court did not reach the issue of whether "risk of not being the prevailing party" may ever justify an upward fee adjustment. U.S. at , 104 S.Ct. at 1550 n. 17.

In the present case, the Court of Appeals, relying on its prior decision in *Hall v. Borough of Roselle,* 747 F.2d 838 (3d Cir. 1984), approved the use of this factor in increasing the base fee award (68a). *Hall* quoted the separate opinion of Justice Brennan and Justice Marshall in *Blum,* U.S. at , 104 S.Ct. at 1550-51, in approving the use of this factor.

In *McKinnon v. City of Berwyn,* 750 F.2d 1383, 1392 (7th Cir. 1985), the Seventh Circuit found that the risk of losing alone would not justify the use of a multiplier, referring to *Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4, 26-28 (D.C. Cir. 1985); the law review article by Professor Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 Yale L.J. 473 (1981); and the contrary holding of the Third Circuit in *Hall v. Borough of Roselle.* The Seventh Circuit analogized this factor to *Hensley v. Eckerhart,* 461 U.S. 424 (1983), which held that attorney fees are not awarded for unsuccessful claims. The court in *McKinnon* stated, 750 F.2d at 1392:

> Suppose a plaintiff asks for and receives a multiplier of 2 because he had a 50 percent chance of losing the case. This means that if the plaintiff's lawyer tries 10 such cases and wins 5 (as one would expect, if the risk of loss is indeed 50 percent), he will be paid as if he had won them all; that is, he will be paid twice his normal charge for each of the 5 cases he won, to compensate him for getting nothing in the 5 cases he lost. Indeed, if the logic of the risk multiplier were applied consistently, the attorney's fee would be larger the riskier the case, even though this would mean rewarding lawyers for flooding the courts with unmeritorious litigation, something we very much do not need. Imagine a class of cases where only one in 50 plaintiffs prevails. Then the risk multiplier would be 50, and a lawyer who brought all 50 cases and lost 49 would receive the same compensation that he would have received had he been certain to win all 50 cases (in which event there would be no multiplier), rather than virtually certain to lose 98 percent of them.

Moreover, in cases where the burden is essentially on the opposing party, the case cannot be considered exceptional and the factor of contingency should not be used in the multiplier. In *McKinnon,* 750 F.2d at 1393, the Seventh Circuit specifically rejected an upward adjustment for risk bearing in strong cases. In *Laffey, supra,* 746 F.2d

at 29, the Court of Appeals for the District of Columbia rejected the concept of an upward adjustment for risk when the chance of success was 50 percent. In the present case, the burden of proof essentially was on the state officials and the risk on plaintiffs was small.

If courts are allowed to use risk as a factor to be included in the multiplier, then the prevailing party is assured of a higher award in close cases than in simple, no-risk cases. Such a consideration effectively punishes the losing party for defending close cases.

This Court left unresolved the issue of whether the risk of not being the prevailing party may ever justify an upward fee adjustment. There exists a conflict among the Circuits on this issue. This Court should now take this issue and resolve the conflict.

C. **Resolution of the multiplier issue, on which Circuit Courts have reached conflicting determinations, in order to bring certainty to the standard to be applied in awarding attorney fees, carries substantial importance for Pennsylvania and the other states.**

There are more than 75 statutes, such as the civil rights statutes, environmental statutes and, federal trade law statutes, which cover broad areas of the law and provide for award of attorney fees. The courts have developed a factor, called the multiplier, which can be used to multiply the presumptively reasonable attorney fee and to arrive at a final award.

The use of the multiplier is the single factor which can be used to dramatically increase the presumptively reasonable attorney fee. In the present case, three paragraphs

added $124,199.50 to the presumptively reasonable attorney fee. In marked contrast, the District Court used approximately 25 pages to articulate the factual basis for the award of $82,153.50 for the presumptively reasonable attorney fee. It is the rare case where an attorney does not ask for a multiplier.

Because of the multiplier's potential as the single most important factor in the award of attorney fees, the numerous statutes providing for them, and the resultant large number of cases which do involve a request for them, it is of national importance for this Court to bring certainty to the standard to be applied in awarding such fees.

D. **The award of attorney fees for reviewing regulations and attending an Environmental Protection Agency public hearing is not authorized by the Clean Air Act, 42 U.S.C. §7604(d), and is in conflict with the decisions of the First and Fifth Circuits.**

The District Court awarded attorney fees to Delaware Valley's attorneys for commenting on regulations (Phase II) and for attending a public hearing (Phase IX). Because these activities neither involved litigation, nor required an attorney's presence, attorney fees cannot be awarded for them.

Section 304(d) of the Clean Air Act, as amended, 42 U.S.C. §7604(d), provides:

> The court, in issuing any final order *in any action brought* pursuant to subsection (a) of this section, may *award costs of litigation* (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

> The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure. (Emphasis added.)

Attorney fees are clearly limited to costs of "litigation" for "actions brought" under the statute. The statute was carefully drawn and excluded the more encompassing term "proceedings".

On August 18, 1979, the draft regulations were published in the Pennsylvania Bulletin (the state equivalent to the Federal Register) for comment by all interested people within thirty days. On September 17, 1979, the thirtieth day, Delaware Valley submitted its comments.

The submission of comments to regulations is a means of communication with government available to any person. An attorney is not required to approve or to sign the comments. Comments are technical or policy-oriented, rather than legal, in nature. The Court, however, awarded counsel fees of $1,722.50, which included $1625 at $65 per hour to reimburse James Lanard. Lanard at this time was employed by Delaware Valley both as Executive Director and staff lawyer. That he had a law degree does not permit him to claim legal fees for a technical phase (commenting on regulations). Because commenting on regulations does not require legal work and is open to the general public, it would be inappropriate to permit a person wishing to comment on regulations who is an attorney or who hires an attorney to bill for those attorney fees.

The District Court also awarded attorney fees of $702 because Delaware Valley submitted comments to the United States at a public hearing on the 1982 State Implementation Plan (SIP). The draft SIP included numerous

elements, and one of those elements under consideration was a change in the coverage area for the I/M program. The development and submission of state implementation plans and modifications is provided for in 42 U.S.C. §7410. Prior to EPA approval, that plan must be submitted at a public hearing. If EPA approves the SIP, review of that federal decision is provided for in 42 U.S.C. §7607.

This SIP revision is a separate process from the court action, and the public hearings are a part of that separate process. If the Environmental Protection Agency (EPA) approves a SIP revision, affected parties may bring an action in federal courts to review that action. The public hearings and submission of comments are open to the general populace, and there is no right to attorney fees for participating in this separate process.

Attorney fees are not permitted for participation in quasi-judicial administrative proceedings prior to the appeal to a court from those proceedings. *Florida Power & Light Co. v. Costle*, 683 F.2d 941, 943 (5th Cir. 1982). Even if the 1982 SIP had given rise to quasi-judicial proceedings before the EPA, Delaware Valley could not have received attorney fees for participating in such proceedings. The public hearings on the SIP are activities even prior to any quasi-judicial agency proceedings and are totally beyond the concept of any attorney fees.

In *Roosevelt Campobello International Park Commission v. Environmental Protection Agency*, 711 F.2d 431, 438-39 (1st Cir. 1983), the court denied attorney fees for work at the administrative agency level under the Clean Water Act. The attorney fee provisions of the Clean Water Act (33 U.S.C. §1365(d)) and the Clean Air Act (42 U.S.C. §7604(d)) are identical. The Clean Air Act and

the Clean Water Act use the more restricted word "action" in lieu of the more general word "proceeding." *Id.* The Clean Air Act, in sum, does not require attorney participation at the public hearing stage and does not provide for attorney fees for work prior to any agency hearing, nor for that agency hearing itself.

In *Webb v. Board of Education of Dyer County,* U.S. , 53 U.S.L.W. 4473 (April 17, 1985), this Court found that attorney fees were not permitted for state administrative hearings under certain civil rights statutes because there was no requirement that the plaintiff pursue those remedies, U.S. at , 53 U.S.L.W. at 4475, even though those statutes are more encompassing, including both "actions" and "proceedings". *See Roosevelt Campobello,* 711 F.2d at 438.

The clear conflict between the opinions in this case and the opinions of the First and Fifth Circuits and the implicit conflict with this Court's recent decision in *Webb,* can only be resolved by this Court's exercise of jurisdiction over this case.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

JAY C. WALDMAN
General Counsel
Office of General Counsel
SPENCER A. MANTHORPE
Chief Counsel
Department of Transportation
JOHN W. CARROLL
Acting Chief Counsel
Department of Environmental Resources
JOHN M. HRUBOVCAK
Assistant Counsel
Department of Transportation

BY: JOHN P. KRILL
Deputy General Counsel
Commonwealth of Pennsylvania
(Counsel of Record)
Attorneys for Petitioners

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTIONS
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

No. 77-0619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., FEBRUARY 24, 1984:

Presently before the court is a request by plaintiffs for attorneys' fees and costs, under the citizen lawsuit provision of the Clean Air Act, 42 U.S.C. §7604(d), for legal services rendered by the Public Interest Law Center of Philadelphia. For the reasons which follow, the request will be granted in an award of $209,813.00 in attorneys' fees and an award of $6,675.03 in costs.

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I. HISTORY OF THE LITIGATION

This litigation has its origins in the requirements of the Clean Air Act of 1970, as amended, 42 U.S.C. §7401, *et seq.* Pursuant to the Act, in April of 1973 the Pennsylvania Department of Environmental Resources ("Penn DER") submitted a plan for meeting federal air quality standards for carbon monoxide and ozone levels in the metropolitan Philadelphia and southwestern Pennsylvania regions. As modified and promulgated by the United States Environmental Protection Agency ("EPA") in November of that year, the plan included a provision requiring the implementation of a program for the inspection and maintenance of automobile emissions systems ("I/M program") by May 1, 1975. 40 C.F.R. §52.2038 (1981).

When, by mid-1976, an I/M program had not been implemented, Delaware Valley Citizens' Council for Clean Air ("DVCCCA") brought suit under 42 U.S.C. §7604 against both the Commonwealth defendants and the EPA (the latter for failing to enforce the Commonwealth's obligations). The EPA also instituted an action of its own against the Commonwealth, pursuant to 42 U.S.C. §7413 (b). EPA was then dismissed as a defendant in the DVCCCA suit, and both actions against Pennsylvania were consolidated.

On August 29, 1978, following prolonged discovery and negotiations, the Commonwealth and two of its departments, Penn DER and the Pennsylvania Department of Transportation ("Penn DOT"), agreed to a final consent decree terminating both the DVCCCA and the United States actions. The defendants agreed to implement an I/M program for ten counties in the Philadelphia and Pitts-

burgh areas by August 1, 1980. The consent decree provided that Penn DOT would first seek legislation instituting a franchise I/M system under which the Commonwealth would enter into contracts with garage owners for establishment of inspection stations. The decree provided that should the legislature fail to effect such a system, Penn DOT would promulgate regulations providing for a private garage I/M system under which the Commonwealth would certify a number of privately owned facilities to perform the inspections. When the legislature did not enact a franchise system, Penn DOT issued final regulations authorizing the alternative system. 9 Pa. Bull. 4193 (Dec. 22, 1979). As part of the consent decree, the Commonwealth paid DVCCCA $30,000.00 for attorneys' fees and costs and EPA paid DVCCCA $8,700.00 for attorneys' fees and costs.

In late 1979 the Commonwealth requested and obtained agreement from DVCCCA and the EPA to modify the original consent decree so as to delay implementation of the I/M program until May 1, 1981. The modification was approved by this court on March 7, 1980. On February 1, 1981, just three months before the I/M program was scheduled to be implemented under the then-existing consent decree, the Commonwealth had still not published final regulations covering the vehicle emissions analyzing equipment which private garages would have to procure in order to become certified inspection stations. On February 6, 1981 the Commonwealth requested DVCCCA and the EPA to consent to another modification of the consent decree so as to delay the start of the I/M program until January 1, 1983. The need for the 20-month delay was to permit the Commonwealth to require the use of computer-

ized analyzer testing equipment. This type of equipment had been recommended by the EPA for decentralized inspection programs such as the Commonwealth's, since it offered greater accuracy and would therefore enhance public confidence in I/M programs. However, this computerized equipment had not yet been produced by any manufacturer, not even in prototype.

This request for modification was the subject of negotiations among the parties but the parties failed to reach agreement and negotiations came to an impasse. On April 29, 1981 the Commonwealth filed a motion with this court for a modification of the existing consent decree which would delay the start-up of the I/M program from May 1, 1981 to January 1, 1983. On May 1, 1981, DVCCCA filed a motion to have the court hold the Commonwealth in violation of the consent decree's requirement that the Commonwealth implement the I/M program by May 1, 1981.

Following a court conference on May 6, 1981, the EPA, at this court's request, submitted a brief report on the current air quality in the Philadelphia and Pittsburgh areas. After receiving the information which indicated an unsatisfactory state of air quality in the Philadelphia and Pittsburgh areas, this court on May 20, 1981, denied the Commonwealth's request for a modification of the decree, found the Commonwealth in violation of the requirements of the consent decree, and ordered submission of a plan for immediate implementation of the I/M program. The Commonwealth submitted such a plan, and this court approved it with certain amendments suggested by DVCCCA. On June 16, 1981, the decree was modified in several respects including another extension of the deadline for implementation of the I/M program until May 1, 1982. On July 24,

1981, this court denied a Commonwealth motion for reconsideration of the June 16, 1981 Order. The Commonwealth then filed with this court a motion requesting a stay pending the outcome of its appeal of this court's Orders of May 20, 1981 and June 16, 1981. Both this court and the court of appeals denied the motion to stay and on March 1, 1982, the court of appeals affirmed the Orders of May 20, 1981 and June 16, 1981. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 976 (3d Cir. 1982). On October 12, 1982, the United States Supreme Court denied the Commonwealth's petition for certiorari. 103 S.Ct. 206 (1982).

In the meantime, following this court's decision in June of 1981, the Pennsylvania General Assembly passed House Bill No. 456, §2 (H.B. 456), which prohibited the expenditure of state funds by the executive branch for the implementation of the I/M program. Although the Governor vetoed the bill, the legislature overrode the veto and enacted H.B. 456 into law. Act of October 5, 1981, No. 99, §2, 1981 Pa. Legis. Serv. 312. Penn DOT and the executive branch immediately ceased all efforts toward implementing the I/M program, except for publication of final regulations pertaining to the standards for emission analyzers to be purchased by the private garage owners choosing to participate in the program. 11 Pa. Bull. 3519 (Oct. 10, 1981).

On October 12, 1981, the Commonwealth moved for a stay of the consent decree and for modification thereof on the basis of H.B. 456. DVCCCA moved to declare defendants in civil contempt and to establish sanctions. On January 22, 1982, this court denied the Commonwealth's motion for a stay and declared the Commonwealth and the

Secretaries of Penn DOT and Penn DER to be in civil contempt and as a sanction ordered the Secretary of the United States Department of Transportation to refrain from approving any projects or awarding any grants under Title 23 of the United States Code for highways in areas in the Commonwealth covered by the consent decree, other than for purposes of safety, mass transit or transportation projects related to air quality improvement or maintenance. 533 F. Supp. 869 (E.D. Pa. 1982). Defendants appealed and moved for a stay of this court's civil contempt Order pending appeal. A stay was granted by the court of appeals on March 19, 1982. A petition by DVCCCA for a rehearing en banc of the stay was denied on April 6, 1982. On May 21, 1982, the court of appeals affirmed this court's Order of January 22, 1982, declaring the Commonwealth defendants to be in contempt of the consent decree and enjoining the Secretary of Transportation from approving the aforementioned projects or grants. 678 F.2d 470 (3d Cir. 1982). The Supreme Court denied both the Commonwealth's application for a stay of the court of appeals' decision and the Commonwealth's petition for certiorari. 103 S.Ct. 14 (1982).

On May 3, 1983, the Pennsylvania General Assembly approved Act 1983-3, 1983 Pa. Legis. Serv. Act No. 1983-3 (Purdon), which authorized the defendant Pennsylvania Secretary of Transportation to proceed with the implementation of the I/M program. On May 4, 1983, the Governor of Pennsylvania signed the Act into law. Subsequent negotiations among the parties led to a new compliance schedule establishing June 1, 1984 as the date for commencement of the I/M program. On May 16, 1983, this court ordered that the civil contempt sanction be vacated.

II. LEGAL FRAMEWORK

The Clean Air Act of 1955, Pub. L. No. 91-604, §12 (a), 84 Stat. 1706 (amended 1977), 42 U.S.C. §7604 (d), provides, in pertinent part:

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section,[1] may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

Plaintiffs seek attorneys' fees and costs under this provision for all activity performed after the issuance of the

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[1] The citizen lawsuit provision of the Clean Air Act, 42 U.S.C. §7604(a), provides, in pertinent part:

> Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or
>
> (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

consent decree on August 29, 1978. In determining plaintiffs' legal fee award, this court is bound by the framework for determining such awards which has been set forth in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (Lindy I) and subsequently refined in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) (en banc) (Lindy II); *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974) (Merola I); *Merola v. Atlantic Richfield Co.*, 515 F.2d 165 (3d Cir. 1975) (Merola II); *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) (Prandini I); *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978) (Prandini II); *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208 (1978) and *Walker v. Robbins Hose Co. No. 1, Inc.*, 622 F.2d 692 (3d Cir. 1980). This framework requires that the court make a determination of the number of hours reasonably necessary to perform the legal services for which compensation is sought. *Hughes*, 578 F.2d at 487. The reasonable number of hours is then multiplied by a reasonable hourly rate for the attorney providing the services, the latter being based on the court's determination of the attorney's reputation, status and type of activity for which the attorney is seeking compensation. *Lindy I*, 487 F.2d at 167. The sum of the two numbers is the "lodestar" which can then be adjusted upward or downward based on the contingency of success, and the quality of an attorney's work. In all instances plaintiffs have the burden of establishing entitlement to the award claimed and any adjustment to the "lodestar." *Hensley v. Eckerhart*, 51 U.S.L.W. 4552 (No. 81-1244, May 16, 1983); *Lindy II*, 540 F.2d at 117.

III. GENERAL GUIDELINES

At the outset it should be noted that unlike other cases where attorneys' fees have been awarded, this case was not one where the parties filed suit, out of which a decision was rendered and the parties then went their separate ways in obedience to that decision. This case has required constant monitoring of the consent decree both by the court and plaintiffs in order to ensure compliance by defendants with both the letter and spirit of the decree as well as to protect the plaintiffs' and the public's rights under the decree.

During the litigation and up until the present day, there has existed an intense adversarial atmosphere among all concerned parties.[2] The defendants' presence has constantly been dominated by either a policy or an attitude that has tried to prohibit or delay the implementation of the I/M program in response to which the plaintiffs have constantly held fast to their position, without being totally inflexible. Additionally, plaintiffs have been required to partake in activities which, while not directly required under the consent decree, were sufficiently related to its goals and the ongoing litigation that such efforts should, and will be compensated for in some reasonable measure.

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[2] Evidence of the continuing adversarial relationship is the bill recently introduced into the Pennsylvania legislature which, if enacted, would attempt to preclude payment of any counsel fees awarded in this litigation. H.R. 1702, 167th Regular Session, Session of 1983 (Printer's No. 2172).

In their petition for attorneys' fees and costs, plaintiffs have divided the requests for compensable hours into nine phases, each phase relating to a different aspect of the litigation. In their response opposing the fee petition, defendants have made specific objections to each phase as well as general objections which pertain to all phases. The court will address the general objections in this section and any specific objections which warrant consideration in the discussion of the compensable hours of each phase.

(A) *Unsuccessful Claims*

Defendants assert that plaintiffs should not be compensated for aspects of this litigation on which plaintiffs were unsuccessful. This argument must be rejected. For this court to itemize each motion, request or claim that has been presented in this complex and prolonged litigation and determine whether plaintiffs were "successful" would be unnecessary as well as impossible. Such an analysis is not required where, as here, plaintiffs have clearly prevailed in attaining what they sought and what would not have occurred without their efforts. This determination follows the recent Supreme Court case of *Hensley v. Eckerhart,* 51 U.S.L.W. 4552 (No. 81-1244, May 16, 1983). The issue before the Court in *Hensley* was whether a partially prevailing plaintiff could recover, under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, an attorney's fee for legal services on unsuccessful claims. The Court stated that where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised by plaintiff. *Hensley,* 51 U.S.L.W. at 4556. There being no doubt that plaintiffs have won substantial relief in this

court,[3] this court refuses to piecemeal the individual motions and claims which were presented during the litigation.

(B) *James S. Lanard*

a) *Contemporaneous Records*

Defendants oppose any award for work done by James Lanard on the grounds that: 1) Mr. Lanard failed to keep contemporaneous time records for much of the period involved; and 2) Mr. Lanard's attempt to reconstruct time records is a sham. While contemporaneous time records are the most desirable way of proving time spent, such is not the only way. Although mere estimates of time are not acceptable, an allowance of attorney's fees may be based on a reconstruction, provided that the records are substantially reconstructed and are reasonably accurate. *Lindy II,* 540 F.2d at 109.

Although all other attorneys who worked on this case have submitted time cards for the work they did, there are

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[3] In the recent Pennsylvania Supreme Court case of *Scanlon v. Commonwealth of Pennsylvania,* Pa. , 467 A.2d 1108 (Pa. 1983), the court held that Penn DOT lacked the authority to enter into the federal consent decree involved in the present lawsuit. A subsequent injunction was issued by the Pennsylvania Commonwealth Court which permanently enjoins Penn DOT from carrying out any activities required by the original consent decree or its modifications. *Burd v. Commonwealth of Pennsylvania,* No. 1506 (Pa. Commw. Jan. 9, 1984). While such rulings may be binding on this court to the extent they interpret the powers of a state agency, the rulings do not and cannot set aside an existing federal consent decree and do not affect the substantial relief plaintiffs have attained in this court.

certain periods during the litigation when Mr. Lanard failed to keep time cards. For such periods, as more specifically set forth in the respective phases, Mr. Lanard has attempted to reconstruct the time spent through reference to notations on his calendar, his notes, specific events related to the case, telephone bills, time sheets and memos drafted with regard to the amount of time spent on this matter. The court, after examining the record in this case and comparing such with Mr. Lanard's requests, is satisfied that the reconstruction was, for the most part, carefully and accurately done. *Lindy II*, 540 F.2d at 109. However, since some of Mr. Lanard's hours are based on reconstruction, the court must require more from Mr. Lanard than would normally be required from an attorney who has submitted contemporaneous time cards. For this reason, time requested by Mr. Lanard which is based on either: 1) time sheets which do not include specific activity but merely follow the chronological history of the case; or 2) on memos drafted for the purpose of relating the time spent, will be denied. The court finds that for such periods Mr. Lanard makes no more than general allegations as to the type of work he has done, failing to meet the specificity which is required in fee petitions.

b) *Employee of One of the Plaintiffs*

Defendants also oppose any award for Mr. Lanard's work on the ground that he was Executive Director of DVCCCA during the litigation. Defendants assert that where a client engages an attorney, the client must aid the attorney but cannot collect attorney fees. Since Mr. Lanard was an officer of DVCCCA, one of the plaintiffs, defendants contend that his hours as an attorney should not be the basis of any award.

While the general rule may be that an attorney who acts for himself is not entitled to a counsel fee against his adversary, *see Picking v. Pennsylvania R.R. Co.*, 11 F.R.D. 71 (M.D. Pa. 1951), general rules do not apply in this case. For much of this litigation Mr. Lanard was the only individual working on a particular aspect of the case. Additionally, Mr. Lanard performed a large part of all the activity for which plaintiffs now seek compensation. To deny any award of attorney fees based on Mr. Lanard's activities would not be equitable under the circumstances of this case.[4]

(C) *Inability to Comply*

Defendants assert throughout their response to plaintiffs' fee petition that they should not be responsible for fees incurred by plaintiffs if the fees were generated in response to activities of governmental branches, other than the executive branch, which impeded implementation of the I/M program. However, as the court of appeals has stated, not only was the executive branch of the Commonwealth bound by the consent decree but all branches were so bound. 678 F.2d 470, 475, *cert. denied*, 103 S.Ct. 298 (1982). Accordingly, there being no distinction among the branches as to being bound by the decree, there will be no distinction as to the cause of fees incurred by plaintiffs in defending their rights under the consent decree.

(D) *Multiple Attendance at Hearings*

Defendants contend that if plaintiffs receive any award, it should not include time spent by an attorney at a

[4] It should also be noted that the court has denied a large percentage of the hours requested by Mr. Lanard, not on the basis of being an employee of DVCCCA but rather, for failure to submit adequate time records for his activities. *See* section III (B) *supra*.

hearing unless that attorney was the one who presented plaintiffs' position at the hearing. The court agrees.

While it is true that more than one attorney has worked on plaintiffs' case, at all times during the hearings only one attorney spoke on behalf of the plaintiffs. While plaintiffs contend that the presence of the other attorneys working on the case was necessary for an understanding of the case, the court is quite sure that if the arguing attorney was competent enough to argue the case, he was competent enough to explain the events of a hearing to his colleagues. Mere attendance in the courtroom by attorneys who were not the principal advocates for the cause is not entitled to compensation.

(E) *Hourly Rates*

The current fee petition requests hourly rates which increase from year to year. While this court recognizes that attorneys' fees do rise over a period of time and that the period covered by the fee petition spans five years, it is more appropriate in this instance to calculate an average rate for each type of work performed during the five years. *See In re Fine Paper Antitrust Litigation,* 98 F.R.D. 48, 83 (E.D. Pa. 1983). In arriving at these rates the court has evaluated the status, reputation and experience of the individual attorneys who performed the activity. The attorneys who performed tasks that required no significant legal ability will not be compensated at high hourly rates just as attorneys who performed clerical or administrative tasks will not be compensated for performing legal tasks. With that in mind, the reasonable average hourly rate for work which this court finds to be the most difficult will be $100.00. For work this court finds could have been done by an attorney working at the associate level, an average

hourly rate of $65.00 will be applied. For work associated with legal work but which required little or no legal ability, the court will grant an average hourly rate of $25.00.

IV. COMPENSABLE HOURS

(A) *Phase I—Failure of Commonwealth to Comply with the Consent Decree of August 29, 1978*

Pursuant to the consent decree of August 29, 1978, the Commonwealth was to commence the I/M program by August 1, 1980. One of the prerequisites for commencement was the publishing, by the Commonwealth, of proposed regulations for the program. Publication was to have been completed by July 1, 1979. The Commonwealth having failed to comply with this requirement, DVCCCA moved to find the Commonwealth in violation of the decree on July 30, 1979. Prior to a hearing before this court on September 20, 1979, at which a new implementation schedule was established, the regulations were published.

Defendants contend that plaintiffs should be precluded from recovering any award for this phase due to plaintiffs' bad faith in refusing to agree to a requested three month extension. This court disagrees that plaintiffs' refusal to grant an extension regarding publication of the regulations was in bad faith. Moreover, plaintiffs had every right to proceed in the manner that they did. The consent decree set forth the date before which publication was required and defendants failed to comply. Plaintiffs' actions were appropriate and required in order to protect their rights as set forth in the decree.

Albert Slap expended 37 hours and Eric Beller expended 6.9 hours in this phase of the case. The court finds

that the activities performed by Mr. Slap and Mr. Beller in this phase were reasonably necessary and not excessive or duplicative.

Mr. Lanard's hours for Phase I work have been reconstructed from his calendar, his notes and specific events related to the case. In this phase, the court finds that Mr. Lanard's reconstruction of hours is specific enough and accurate enough that the hours should be granted. However, because Mr. Lanard's request includes time spent in preparation for the contempt hearing and for attendance at the hearing, the time granted will be reduced from the 29 hours requested to 25 hours.[5] These 25 hours were necessary and not excessive for the work performed.

A reasonable average hourly rate for the activities performed in Phase I by Mr. Slap is $65.00, most of the activities involving telephone calls, meetings and discussions. The same average hourly rate will be applied to the compensable hours of Mr. Beller and Mr. Lanard, since their activities consisted of research, discussions, meetings and submission of comments to the regulations.

[5] Although this court is of the opinion that it was Mr. Slap who represented plaintiffs at the contempt hearing, the court can find no information to indicate whether Mr. Slap or Mr. Lanard actually represented plaintiffs at the contempt hearing. However, to the extent it was Mr. Lanard who actually represented plaintiffs at the hearing, the attorney fee award for this phase need not be changed since Mr. Slap has been granted hours for the activity at the same hourly rate as applied to Mr. Lanard's activities in Phase I.

Phase I

	Compensable Hours	*Hourly Rate*		
Mr. Slap	37	$65	=	$2405.00
Mr. Beller	6.9	$65	=	$ 448.50
Mr. Lanard	25	$65	=	$1625.00
		Phase I Lodestar		$4478.50

(B) *Phase II—Revisions of Original Consent Decree*

Following the publication of the I/M program regulations and the court hearing on September 20, 1979, DVCCCA continued to monitor defendants' performance under the consent decree and submitted comments on the regulations which were published in the Pennsylvania Bulletin. Plaintiffs request a total of 41 hours for this phase, 37.5 hours for Mr. Lanard, and 3.5 hours for Mr. Slap.

The publishing of the regulations was required under the consent decree. While it is true that the opportunity to submit comments to the proposed regulations was available to any person, it does not follow, as defendants contend, that plaintiffs should not be compensated for the time used in preparing comments. Plaintiffs had an interest in the regulations since they were a party to the consent decree. Their interest was based on a desire to ensure compliance with the consent decree and to protect their rights thereunder. The usefulness of plaintiffs' comments was manifested in the revisions that were made to the original proposed regulations.

Plaintiffs' request for 37.5 hours for Mr. Lanard's work is based on a reconstruction formed by references to

his r[illegible] The court determines that, while the reconstruction was carefully and accurately done, the number of hours for the work claimed is excessive. For this activity which mostly includes submitting comments to the regulations, reviewing EPA's submissions and attendance at a meeting to discuss the regulations, 25 hours is a reasonable amount of time.

The request for 3.5 hours expended by Mr. Slap is based on attendance at a conference regarding the consent decree and on consent decree monitoring. The court, being unable to determine what activities constituted the consent decree monitoring will reduce the requested hours to 1.5 hours.

A reasonable average hourly rate for the activities performed by Mr. Lanard and Mr. Slap is $65.00 since such activities are not the type entitled to the higher hourly rates reserved for more difficult work.

Phase II

	Compensable Hours	*Hourly Rate*		
Mr. Lanard	25	$65	=	$1625.00
Mr. Slap	1.5	$65	=	$ 97.50
Phase II Lodestar				$1722.50

(C) *Phase III—Modification of the August 29, 1978 Consent Decree*

Due to the substantial number of comments to the proposed regulations a modification to the consent decree was required. Such modification, approved by this court on March 7, 1980, delayed commencement of the I/M program from August 1980 until May 1981.

Plaintiffs have requested that this court grant 2.2 hours for work Mr. Balter did regarding this modification. The work for which compensation is sought is an analysis of ozone formation and a reading of the amended decree, work that was reasonably necessary and for which plaintiffs will be compensated.

Plaintiffs request that 61.75 hours be approved for time spent by Mr. Lanard in this phase. The hours requested are hours reconstructed from Mr. Lanard's notes and calendar. Although the court determines that for the most part the reconstruction was carefully and accurately done, the amount of time expended was excessive and in some cases is not sufficiently described. The review of pending legislation that may have affected the I/M program and of proposals regarding modification could reasonably have been completed in 6 hours. Additionally, the 10.5 hours spent on the "Thornburgh memo" and .25 hours on activity which is unspecified will be denied since this court is unable to determine what activities these hours cover and how much time would be required to reasonably perform these tasks. Accordingly, for all the necessary activities performed by Mr. Lanard in Phase III, 26 hours is a reasonable amount of time in which these activities could have been performed.

Mr. Balter's hours will be compensated at the rate of $25.00 per hour since the activities did not require any legal analysis. Mr. Lanard's hours will be compensated at the rate of $65.00 per hour. Despite being plaintiffs' lead counsel in this phase, the activities performed by Mr. Lanard, which included attendance at hearings, were not the type of activities which should be compensated at a high hourly rate.

Phase III

	Compensable Hours	*Hourly Rate*		
Mr. Balter	2.2	$25	=	$ 55.00
Mr. Lanard	26	$65	=	$1690.00
Phase III Lodestar				$1745.00

(D) *Phase IV—Commonwealth in Violation of the First Modification of the Consent Decree*

In February of 1981, the Commonwealth requested a second modification of the consent decree to extend the date of commencement of the I/M program on the basis that the EPA had recommended, for states such as Pennsylvania, a type of emission analyzer different from the one required under the consent decree. Negotiations failed to resolve the matter and on April 29, 1981, the Commonwealth filed a motion to modify the decree and delay the start of the I/M program until January 1, 1983. A substantial amount of litigation followed ending with the Supreme Court's denial of the Commonwealth's petition for certiorari on October 12, 1982. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 103 S.Ct. 206 (1982).[6]

[6] The activities in this phase for which plaintiffs seek compensation were based on the following events:

April 29, 1981: The Commonwealth filed a motion to modify the consent decree to delay the start of the I/M program from May 1, 1981 to January 1, 1983.

April 30, 1981: The Commonwealth moved for a stay of the consent decree.

May 1, 1981: DVCCCA filed a motion to declare the Commonwealth in violation of the consent decree.

Plaintiffs have requested 3 hours for Mr. Gilhool's attendance at a court hearing held on February 2, 1982. For the reasons stated in section III (D) above, the hours will be denied. For the same reason, the time requested for Mr. Churchill will be reduced by 3 hours; the remaining 5.1 hours of Mr. Churchill were reasonable and necessary to the events in Phase IV.

May 6, 1981: The court convened a conference to hear the views of the parties on the foregoing motions.

May 20, 1981: The court, after receiving a requested report from the EPA on air quality in the regions affected by the consent decree, issued an order declaring the Commonwealth in violation of the consent decree and denying the Commonwealth's motion for a stay and denying the motion for a modification.

June 1, 1981: The Commonwealth moved for reconsideration of the court Order of May 20.

June 8, 1981: DVCCCA filed its answer to the Commonwealth's request for reconsideration.

June 8, 1981: DVCCCA filed its comments to the Commonwealth's proposals for implementing I/M.

June 10, 1981: The court held a hearing on the Commonwealth's motion for reconsideration and the Commonwealth's proposals for implementing I/M.

June 16, 1981: The court issued an Order denying the request for reconsideration and establishing May 1, 1982 as the start-up date for an I/M program.

June 26, 1981: The Commonwealth filed a motion for reconsideration of the court Order of June 16, 1981.

July 8, 1981: DVCCCA filed its answer in opposition to the request for reconsideration.

July 14, 1981: The Court denied the Commonwealth's request for reconsideration.

July 30, 1981: The Commonwealth filed a notice of appeal to the circuit court in respect to the court Orders of May 20 and June 16.

Plaintiffs have requested 398.75 hours for Phase IV work performed by Mr. Lanard. The hours requested are

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July 30, 1981: The Commonwealth filed a motion to this court requesting a stay pending the outcome of its appeal to the circuit court.

August 10, 1981: DVCCCA filed its answer in opposition to the Commonwealth's request for a stay.

August 20, 1981: This court denied defendants' motion for stay pending appeal.

August 7, 1981; Commonwealth filed notice of appeal in re this court's Orders of May 20, 1981 and June 16, 1981.

August 27, 1981: Commonwealth filed motion for stay of this court's Order of June 16, 1981.

September 4, 1981: DVCCCA filed response in opposition to Commonwealth's request for stay.

September 11, 1981: Commonwealth motion for expedited hearing.

September 14, 1981: Circuit court denied motion for stay.

September 18, 1981: Circuit court denied motion for expedited hearing.

October 9, 1981: DVCCCA filed brief in opposition to Commonwealth's appeal brief.

February 2, 1982: Circuit court hearing on Commonwealth appeal.

March 1, 1982: Circuit court affirms this court's Order of May 20, 1981 and Order of June 16, 1981.

March 12, 1982: Commonwealth petition for *rehearing en banc*.

March 26, 1982: Circuit court denied petition for rehearing.

June 22, 1982: Commonwealth petition to United States Supreme Court for writ of certiorari.

July 22, 1982: DVCCCA filed brief in opposition to petition for certiorari.

October 12, 1982: United States Supreme Court denied petition for certiorari.

based on time reconstruction and contemporaneous records. The hours which are based on reconstruction and which cover the period from January 1, 1981 until August 20, 1981, will be denied as not being specific enough, not necessary and not reasonable. Although Mr. Lanard has attempted to adequately reconstruct the hours for this time period, the court finds that it would neither be reasonable nor fair to allow plaintiffs to be compensated for the substantial number of hours simply noted as "Commonwealth Request for 20 months," "Negotiations re: Commonwealth Request for 20 months," "DVCCCA Motion to Declare Comm. in violation of Consent Decree," and "Answer to Commonwealth Motion to Reconsider and Comments to Comm. Proposed I/M Plans." Further explanation as to what work was performed is required. Additionally, the requested hours for this phase include: 1) hours for preparation for and attendance at a court hearing at which Mr. Lanard's presence was not necessary; and 2) hours for time spent on reconstruction, time which would have been unnecessary had Mr. Lanard kept contemporaneous records.

For the period in Phase IV commencing on August 24, 1981, Mr. Lanard kept contemporaneous time records. The court finds that, with certain exceptions, such time was necessary and not duplicative of work being performed by any other attorney. The exceptions include hours requested for Mr. Lanard's preparation and attendance at hearings at which his presence was unnecessary. Accordingly, the court finds that a reasonable amount of time for the compensable activities performed in Phase IV by Mr. Lanard is 52 hours.

Plaintiffs have requested 337.10 hours for the work performed in Phase IV by Mr. Balter. Initially it should

be noted that the work performed in this phase of the litigation spanned a period of eleven months and involved a number of court hearings, including a request for a stay and an appeal to the court of appeals. The period also covers activity which, while not litigation activity per se, was, for the most part, sufficiently related to the enforcement of the consent decree and the I/M program. Accordingly, upon examination of the carefully documented records, the court determines that 330 hours is a reasonable amount of time for the necessary work performed by Mr. Balter in this phase.

The hourly rate for the Phase IV work performed by Mr. Churchill will be compensated at a rate of $65.00 per hour. The work performed included attendance at conferences and the reading of drafts and opinions. Such activity was short in duration, not requiring and actually precluding any type of significant legal analysis.

The work performed by Mr. Lanard for which he will be compensated included: 1) research on the Commonwealth's motion for a stay and its appeal of this court's orders; 2) meetings with co-counsel; and 3) a meeting with the Bucks County Garage Association, Hamilton Test System and Penn DOT, a meeting which this court determines was reasonable and necessary in order to protect both plaintiffs' rights and the integrity of the consent decree. Although Mr. Lanard's Phase IV activity included some legal work, the legal work performed, as well as the other activities, was not the type of activity which should be compensated at a high hourly rate reserved for more difficult legal activities. Accordingly, Mr. Lanard's work in Phase IV will be compensated at a rate of $65.00 per hour.

The work performed by Mr. Balter in this phase was work typical of work performed by lead counsel in any complex litigation and involved representation of his client's interests both before this court and the court of appeals on matters that could have delayed the implementation of the I/M program beyond an acceptable period. Accordingly, the activity should be compensated at a high hourly rate. Mr. Balter's activities in Phase IV will be compensated at a rate of $100.00 per hour.

Phase IV

	Compensable Hours	*Hourly Rate*		
Mr. Churchill	5.1	$65	=	$ 331.50
Mr. Lanard	52	$65	=	$ 3,380.00
Mr. Balter	330	$100	=	$33,000.00
Phase IV Lodestar				$36,711.50

(E) *Phase V—Pennsylvania Legislature Prohibits Compliance with Consent Decree*

Following this court's Order of June 16, 1981, the Pennsylvania General Assembly, over veto of the Governor, enacted H.B. 456 into law, preventing expenditure of state funds for implementation of the I/M program. The substantial amount of litigation which followed is the basis for the hours requested for this phase.[7]

[7] The activities in Phase V for which plaintiffs seek compensation were based on the following events:

October 12, 1981: Commonwealth moves for stay of consent decree and for modification of consent decree as a result of H.B. 456.

October 19, 1981: DVCCCA moves to declare defendants in civil contempt and to establish sanctions.

Plaintiffs' request for 13.6 hours for Mr. Gilhool's work will be reduced to 6.1 hours due to unnecessary attendance at a court hearing and failure to describe in the contemporaneous time cards what activities were performed by Mr. Gilhool on the 5th and 6th of April 1982. The remaining 6.1 hours were reasonable and necessary.

October 29, 1981: DVCCCA brief in opposition to Commonwealth's motion for modification.

November 6, 1981: DVCCCA memorandum in re United States memorandum.

November 20, 1981: Court hearing on DVCCCA contempt motion.

December 12, 1981: DVCCCA submits brief to this court concerning applicability of Contract Clause of the United States Constitution.

December 30, 1981: United States submits report to this court on status of I/M program.

January 5, 1982: DVCCCA comments on United States' report.

January 22, 1982: This court declares defendants to be in civil contempt and imposes civil contempt sanctions.

February 9, 1982: Commonwealth moves for stay of January 22, 1982 Order.

February 22, 1982: DVCCCA memorandum in opposition to stay request.

February 18, 1982: This court denies Commonwealth request for stay.

February 5, 1982: Commonwealth notice of appeal to Third Circuit Court of Appeals of this court's Order of January 22, 1982.

March 8, 1982: Commonwealth motion for stay of January 22, 1982 contempt order.

March 16, 1982: DVCCCA brief in opposition to motion for stay.

March 19, 1982: Circuit court hearing on motion for stay.

Plaintiffs have requested 35.25 hours for the Phase V work performed by Mr. Churchill. This request includes

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March 19, 1982: Circuit court grants stay of contempt sanction.

March 23, 1982: DVCCCA petition for *rehearing en banc*.

April 6, 1982: Circuit court denies DVCCCA petition for rehearing.

April 13, 1982: DVCCCA brief in opposition to Commonwealth's appeal.

May 13, 1982: Circuit court oral arguments on Commonwealth's appeal of this court's Order of January 22, 1982.

May 21, 1982: Circuit court affirms this court's Order of January 22, 1982.

June 7, 1982: Commonwealth motion for stay of circuit court ruling.

June 14, 1982: DVCCCA memorandum in opposition to motion for stay.

June 23, 1982: Circuit court denies motion for stay.

June 27, 1982: Commonwealth application to United States Supreme Court for stay.

July 29, 1982: DVCCCA memorandum to United States Supreme Court in opposition to motion for stay.

July 30, 1982: Mr. Justice Brennan denies motion for stay.

August 6, 1982: Commonwealth application for stay to Mr. Justice Rehnquist.

August 6, 1982: DVCCCA memorandum in opposition to request for stay.

September 9, 1982: United States Supreme Court denies application for stay.

August 17, 1982: Commonwealth petition for writ of certiorari filed with Supreme Court.

October 7, 1982: DVCCCA files brief in opposition to Commonwealth's petition for certiorari.

November 1, 1982: United States Supreme Court denies writ of certiorari.

unnecessary time spent at court hearings and at a press conference which was not required under the consent decree nor was necessary to protect plaintiffs' rights under the decree. The time requested also covers work which was duplicative of the work being performed by Mr. Balter and Mr. Lanard in Phase V. Accordingly, a reasonable amount of time required to perform the necessary work that Mr. Churchill performed in Phase V is 20 hours.

Plaintiffs request 105.5 hours for work performed by Mr. Lanard in this phase, such request being based on contemporaneous time records of Mr. Lanard. Most of the activities performed by Mr. Lanard in this phase were reasonable and were related to the contempt proceedings and the "contract clause" memo required by this court's Order of November 11, 1981. As such, the time spent will be compensated with certain exceptions. The requested time will be reduced due to unnecessary attendance at a court hearing, time sheet notations which are illegible and indications that there is some uncertainty as to the significance of certain activities (time sheet 9/25/81; 10/6/81; 10/19-10/28/81; 11/20/81). A reasonable amount of time for this work which was necessary and prolonged due primarily to the presence of complex issues which required a substantial number of hours, is 88 hours.

For Phase V work performed by Mr. Balter plaintiffs request 465.9 hours. During this phase Mr. Balter worked on the issues dealing with holding the Commonwealth in contempt, issues that required extensive research and analysis. However, once the research and analysis had been completed there was no need to spend the amount of time that was spent on similar research and analysis for the stay requests or appeals. A reasonable amount of time for all

of the activities associated with the contempt order in this phase performed by Mr. Balter is 200 hours. Additionally, Mr. Balter performed certain activities in Phase V which, while not related to the contempt order, were sufficiently related to this litigation that they should be compensated. A reasonable amount of time required to perform such activities is 10 hours, such determination including denials of requested time for press conferences and interviews and for activities for which this court has determined there is inadequate explanation (time sheet 3/23/82; 6/24/82; 9/14/82).

The work performed by Mr. Gilhool and Mr. Churchill in Phase V for which they will be compensated consisted mostly of attending conferences and performing activities for which no original legal analysis was required. Moreover, the time spent on each activity was of such short duration that neither attorney could have been involved to any great extent in the complex issues of Phase V. Accordingly, Mr. Gilhool and Mr. Churchill will be compensated at a rate of $25 per hour.

Most of the activities which Mr. Lanard performed in Phase V dealt with researching issues relating to the contempt order and the Constitution's contract clause. Since Mr. Lanard was more involved in this phase of the litigation than Mr. Gilhool or Mr. Churchill, and since his activities consisted of legal analysis, he will be compensated at a rate of $65 per hour.

Mr. Balter was unquestionably the lead counsel for plaintiffs in this part of the litigation. He represented plaintiffs at all the hearings as well as doing much of the groundwork which was helpful in resolving the difficult issues before this court. This was not the type of work that would be assigned to any one other than an attorney with a

high degree of skill. Accordingly, Mr. Balter will be compensated at a rate of $100.00 per hour.

Phase V

	Compensable Hours	*Hourly Rate*		
Mr. Gilhool	6.1	$25	=	$ 152.50
Mr. Churchill	20	$25	=	$ 500.00
Mr. Lanard	88	$65	=	$ 5,720.00
Mr. Balter	210	$100	=	$21,000.00
Phase V Lodestar				$27,372.50

(F) *Phase VI—Intervention of Third Parties*

A number of unsuccessful attempts were made to intervene in this action.[8] Plaintiffs request that attorney fees be awarded for their attempts to oppose these interventions. Defendants contend that they should not be held accountable for actions of others to which plaintiffs responded.

With regard to the intervention attempt by Representatives and Senators of the Commonwealth, defendants' argument fails for the reason that the identities of those who sought to intervene were not that distinct from that of the executive branch so as to preclude recovery against defendants. Moreover, for the purpose of being bound by the consent decree, all the branches of the Commonwealth were characterized as being as one. *See Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 678 F.2d 470 (3d Cir.), *cert. denied,* 103 S.Ct.

[8] The attempted interventions, which plaintiffs opposed, were attempts by Pennsylvania legislators and an attempt by the City of Pittsburgh.

298 (1982). Additionally, plaintiffs' opposition to all of the intervention attempts was for the purpose of protecting their rights under the consent decree. Had plaintiffs not opposed the interventions, as they had the right to do, their rights in enforcing the decree may have been prejudiced. Such a conclusion is amply supported by a recent Pennsylvania Supreme Court decision, the case having been brought by a number of Pennsylvania legislators. That decision purportedly eradicates plaintiffs' right under the consent decree.[9]

Based on contemporaneous time records of Mr. Lanard, plaintiffs request 37.5 hours for time Mr. Lanard spent on activities related to the intervention attempts by state legislators. Such activities included the researching and writing of the brief opposing intervention and preparation for argument before the court of appeals. The court finds that 15 hours is a reasonable amount of time to be spent on such activity.

Plaintiffs request 17.5 hours for work performed by Mr. Balter on the intervention attempt by the City of Pittsburgh. The court finds that 13 hours is a reasonable amount of time to spend on the activity, such activity being preparation of a brief submitted to the court of appeals.

A reasonable hourly rate for the activities performed by Mr. Lanard and Mr. Balter in Phase VI is $65.00 per hour.

[9] As stated previously in note 3, *supra,* the part of the Pennsylvania Supreme Court's decision in *Scanlon v. Commonwealth of Pennsylvania,* Pa. , 467 A.2d 1108 (Pa. 1982), which suggests that the federal consent decree is invalid is not binding on this court and therefore does not affect plaintiffs' rights under the consent decree.

Phase VI

	Compensable Hours	*Hourly Rate*		
Mr. Lanard	15	$65	=	$ 975.00
Mr. Balter	13	$65	=	$ 845.00
Phase VI Lodestar				$1,820.00

(G) *Phase VII—Certification of Exceptions to Court Order Of January 22, 1982*

Compensation sought for work in this phase of the litigation is based on plaintiffs' monitoring of the contempt sanction and their opposition to the Commonwealth's attempt to certify certain projects as exceptions to this court's contempt Order of January 22, 1982. Both activities were reasonably related to the litigation and necessary in order to protect plaintiffs' rights under the consent decree. As such, the necessary hours expended should be compensated.

Plaintiffs request 6.8 hours for Mr. Gilhool's work in Phase VII. All the hours will be denied as unnecessary since they were duplicative of the hours spent by Mr. Balter and Mr. Churchill. Mr. Churchill's hours, while not duplicative, are to a certain extent inadequately documented and include hours for unnecessary attendance at court hearings. Accordingly, plaintiffs will be granted 5.7 of the 8.15 hours requested for Mr. Churchill's Phase VII work, such hours being reasonable and necessary.

Plaintiffs request 88.3 hours for Phase VII work performed by Mr. Balter. For the most part the hours cover preparation for and attendance at court hearings and depositions dealing with the certification of certain highway

projects as exceptions to the contempt sanction. Although this work was necessary the number of hours expended was excessive. A reasonable number of hours necessary for all the activities included in Phase VII performed by Mr. Balter is 50 hours, the court having determined that the hours spent on the memorandum to this court regarding the certification projects and on the subsequent appeal were excessive.

The hourly rate for work performed by Mr. Churchill will be $65.00 and the hourly rate for Mr. Balter will be $100.00, such rates being reasonable for the activities performed.

Phase VII

	Compensable Hours	*Hourly Rate*		
Mr. Churchill	5.7	$65	=	$ 370.50
Mr. Balter	50	$100	=	$5,000.00
Phase VII Lodestar				$5,370.50

(H) *Phase VIII—Passage of I/M Legislation and Vacating of Sanctions*

Plaintiffs claim 43.5 hours for activities in connection with: 1) passage of Act 3 of 1982[10] which permitted implementation of the I/M program to go forward; and 2) this court's removal of the contempt sanctions on May 16, 1983. The number of requested hours in this phase is 43.5, all the hours being based on work performed by Mr. Balter.

Defendants contest awarding fees for time spent on "preparation of a stipulated penalty motion" (Balter's time

[10] 1983 Pa. Legis. Serv. Act No. 1983-3 (Purdon).

sheet 5/9/83-5/12/83). Plaintiffs have stated that they have no knowledge of such a motion (DVCCCA reply brief at 27). Accordingly, no time will be awarded for such. The hours spent during May 4, 1983, through May 6, 1983, were excessive and will be reduced by one-half. The total number of reasonable hours in Phase VIII necessary to this litigation was 24 hours. A reasonable rate for these hours expended is $65.00 per hour, the activities not requiring any detailed legal analysis and consisting of several meetings.

Phase VIII

	Compensable Hours	*Hourly Rate*		
Mr. Balter	24	$65	=	$1560.00
Phase VIII Lodestar				$1560.00

(I) *Phase IX—Associated Activities*

In this phase plaintiffs seek compensation for activities their attorneys performed in state court litigation and in regulatory actions, such activities not directly required by this court's Orders.

a) *State Court Litigation*

Plaintiffs request a total of 23.6 hours for work their attorneys performed in connection with attempts in state court by several members of the Pennsylvania General Assembly to prevent implementation of the I/M program. *See Burd v. Commonwealth of Pennsylvania,* 66 Pa. Commw. 129, 443 A.2d 1197 (1982).[11] Defendants con-

[11] Both the *Burd* case and *Scanlon v. Commonwealth of Pennsylvania*, 66 Pa. Commw. 129, 443 A.2d 1197 (1982), were appealed to the Pennsylvania Supreme Court. The supreme court's decision of October 26, 1983, was in favor of the state legislators. *See* notes 3 and 9, *supra*.

tend that such request should be denied alleging that: 1) they were the ones who prepared the legal documents and presented all the legal arguments in this state litigation; and 2) plaintiffs' role was relegated to submission of an amicus brief. Defendants' argument lacks merit. Based on the past actions of defendants, any reasonable party in plaintiffs' position would be hesitant to rely solely on defendants in an action where defendants were the ones seeking implementation of the I/M program. The fact that plaintiffs were seeking to protect their rights under the consent decree in a forum different from the original forum is not important. As long as plaintiffs' activities were in pursuit of protecting their rights under the decree it didn't matter whether the time spent was in this court, in the library, or on a brief submitted in state court.

The request for .4 hours for review of the *Burd* case by Mr. Churchill will be granted.

The requested 5 hours for a trip to Harrisburg by Mr. Lanard for the case in which DVCCCA was amicus is denied as unnecessary.

A reasonable amount of time spent by Mr. Balter on this aspect of the case is 11.4 hours, the other hours claimed not sufficiently related to the litigation or inadequately explained.

The preparation of the amicus brief by Mr. Balter will be compensated at an hourly rate of $65.00 and Mr. Churchill's review of the *Burd* case will be compensated at an hourly rate of $25.00.

b) *EPA Regulatory Activity*

Plaintiffs, during the course of this litigation, participated in EPA hearings during which: 1) defendants requested that EPA modify the state implementation plan ("SIP") so that the I/M program would cover a smaller geographic area; and 2) proposals of cut-offs of EPA funding were discussed.

The activities which occurred due to the defendants' request for a modification of the I/M program were related to this litigation since an EPA modification of the I/M program would have affected plaintiffs' rights under the decree. For these activities plaintiffs will be compensated. However, participation in hearings concerning the possibility that the EPA would cut-off federal grants to Pennsylvania was activity which was not sufficiently related to this litigation since any such EPA decision would not have affected plaintiffs' rights under the decree. Therefore the hours spent on this latter activity will be denied. Based on the foregoing, the court will grant, as a reasonable number of hours, the 4 hours requested for Mr. Lanard's work. The court will also grant 6.8 hours as a reasonable number of hours for work performed by Mr. Balter in this phase.

Both Mr. Lanard and Mr. Balter will be compensated at a rate of $65.00 per hour, a rate reasonable for the activities involved.

Phase IX

	Compensable Hours	*Hourly Rate*		
a)				
Mr. Churchill	.4	$25	=	$ 10.00
Mr. Balter	11.4	$65	=	$ 741.00

b)				
Mr. Lanard	4	$65	=	$ 260.00
Mr. Balter	6.8	$65	=	$ 442.00
		Phase IX Lodestar		$1,453.00

(J) *Fee Petition*

Plaintiffs request a total of 101.8 hours for preparation of the fee petition, 88.3 hours requested for Mr. Balter's work and 13.5 hours for Mr. Lanard's work. Attorneys may be compensated for time spent in the preparation of a fee petition to the extent that the time was reasonably necessary for obtaining a reasonable fee award. *Prandini v. National Tea Co.*, 585 F.2d 47, 54 (3d Cir. 1978).

A reasonable amount of time for Mr. Lanard's work on the petition is 10 hours.

Mr. Balter's request of 88.3 hours for work on the fee petition is excessive. Based on the time sheets submitted, it is evident that Mr. Balter has been preparing the fee petition throughout this litigation. Whether this activity was based on the hopeful expectation that the litigation was to cease at that point in time or based on some other reason is unimportant. What is important is that Mr. Balter continually prepared or updated the fee petition throughout the various phases of this litigation and then used an additional 40 hours at the end of the litigation for the same activity. This court finds that 40 hours is a reasonable amount of time necessary for Mr. Balter to prepare a fee petition in this case based on the fact that the petition is comprised of, for the most part, contemporaneous time records and based on the fact that Mr. Balter continually updated the fee petition.

Plaintiffs have also submitted a supplemental memorandum in which they request hours for attendance at a hearing concerning the fee petition as well as for hours spent in answering interrogatories submitted by the defendants. Since these requested hours include hours spent by attorneys, other than Mr. Balter, whose presence was unnecessary at the fee petition hearing and since the court determines that plaintiffs have already been adequately compensated for activity constituting fee petition preparation, the court will only grant as compensable time the 2 additional hours spent by Mr. Balter at the hearing. A reasonable compensable hourly rate for the work performed on the fee petition is $65.00.

Fee Petition

	Compensable Hours	*Hourly Rate*		
Mr. Lanard	10	$65	=	$ 650.00
Mr. Balter	42	$65	=	$2,730.00
				$3,380.00

V. MULTIPLIER

After determining the lodestar amount of the fee, an adjustment may be made. *Lindy I*, 487 F.2d 161 (3d Cir. 1973); *Lindy II*, 540 F.2d 102 (3d Cir. 1976); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978). The adjustment may be based on the contingent nature of the case, the quality of the work performed and the results obtained. *Hensley v. Eckerhart*, 51 U.S.L.W. 4552, 4555 (May 16, 1983); *Lindy I* at 169; *Lindy II* at 117. Plaintiffs have requested that this court use a multiplier of 2 for Phases V and VI and a multiplier of 3 for Phase VII. Defendants argue that

if any fees are granted to plaintiffs no multiplier should be used.

The contingent nature of plaintiffs' success has been apparent throughout this litigation. Plaintiffs entered the litigation against the U.S. Government and the Commonwealth of Pennsylvania. The case involved new and novel issues, the resolution of which had little or no precedent. Commencing in Phase IV and continuing up until the present, plaintiffs have had to defend their rights under the consent decree due to numerous attempts by defendants and others to overturn or circumvent this court's Orders.

The quality of plaintiffs' work was superior in the phase in which this court imposed a civil contempt sanction on defendants (Phase V). Even this court expressed its concern for the avoidance of undue interference with essential elements of state sovereignty in its decision to countermand the decision of the state legislature not to expend funds for the I/M program. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. 869 (E.D. Pa.), *aff'd* 678 F.2d 470, *cert. denied*, 103 S.Ct. 298 (1982). Plaintiffs' work in this phase helped not only this court but also the court of appeals in resolving this difficult issue. An increase based on the quality of work performed which culminated in an outstanding result is fully justified. *See Ursic v. Bethlehem Mines*, 719 F.2d 670, 674 (3d Cir. 1983).

Accordingly, based on the foregoing, a multiplier of 2 will be applied to the awarded fees of Phases IV and VII, the phases which this court determines were the ones, in addition to Phase V, where likelihood of success was least. A multiplier of 4 will be applied to the awarded fees of

Phase V, such phase being one of the phases where eventual implementation of the I/M program seemed least likely and the phase where plaintiffs' work was superior.

VI. COSTS

The Clean Air Act provides, in pertinent part, that "The court . . . may award costs of litigation (including . . . expert witness fees) . . . ." 42 U.S.C. §7604 (d). Items which may be taxed as costs are listed in 28 U.S.C. §1920:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Plaintiffs request a total of $10,664.78 in costs, apportioned as follows: court reporters—$1,229.03; printing —$8,903.75; and expert witness fee—$552.00. Defendants contend that certain items included by plaintiffs' request are not taxable because they are not provided for in section 1920, not documented, not related to claims where plaintiffs prevailed or not reasonably incurred.

As stated previously in this Opinion, the fact that a plaintiff has not prevailed on every issue or claim presented to this court will not prevent recovery where there has been substantial success in achieving the result sought. *See Hensley,* 51 U.S.L.W. 4552; *Natural Resources Defense Council v. Envir. Protection Agency,* 484 F.2d 1331 (1st Cir. 1973). However, with respect to costs not specifically authorized by statute, this court should exercise its discretion sparingly. *Walker v. Robbins Hose Co. No. 1, Inc.,* 622 F.2d 692, 694 (3d Cir. 1980).

Plaintiff has requested $1,229.03 for court reporter costs incurred for the depositions of the designee of the U.S. Secretary of Transportation and of employees of Penn DOT. These depositions were taken in preparation for the court hearing which was convened to determine whether seven highway projects were to be certified as exceptions to the court's contempt Order (Phase VII). Such costs are taxable since they were reasonable and necessary to the case. *See State of Illinois v. Sangamo Const. Co.,* 657 F.2d 855 (7th Cir. 1981); *Hugney v. Consolidation Coal Co.,* 59 F.R.D. 258 (W.D. Pa. 1978).

Plaintiffs seek an award in the sum of $552.00 for the fee of an expert. Mr. Robert Morris, an expert in transportation planning, assisted plaintiffs at the above mentioned depositions. Mr. Morris never testified before this court. Expert witness fees not provided for by statute may be taxed as costs when the expert's testimony was helpful to the court and played an important role in resolving the issues in the case. *Roberts v. S.S. Kyriakoula D. Lemos,* 651 F.2d 201 (3d Cir. 1981); *Commonwealth of Pennsylvania v. O'Neill,* 431 F. Supp. 700 (E.D. Pa. 1977), *aff'd mem.,* 573 F.2d 1301 (3d Cir. 1978). Ordinarily, no fees

may be allowed for witnesses who do not testify at trial. *Wehr v. Burroughs Corp.*, 477 F. Supp. 1012 (E.D. Pa. 1979). Since Mr. Morris did not testify before this court and since this court is unable to determine whether Mr. Morris' expertise helped resolve any issue, the request for compensation of his fees will be denied.

Plaintiff has requested a sum of $3557.75 for reproduction costs of briefs to the United States Supreme Court. While the cost of the transcript of record submitted to the Supreme Court is a taxable item in the court below, the expense of printing briefs is not taxable. Sup. Ct. R. 50(.3). Accordingly, the request for reproduction costs of Supreme Court briefs will be denied.

Plaintiffs' request for the cost of printing copies used in this litigation is reasonable and the cost of such copies was a necessary expense in this litigation. Therefore, such request will be granted in the amount of $5,346.00.

Plaintiffs' request for $100.00 for their share of the cost of the transcript ordered by the court of appeals in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 970 (3d Cir. 1982) will be granted. Fed. R. App. P. 39(e).

COST ALLOWED

Transcript Ordered by Third Circuit	$ 100.00
Court Reporter Costs re: Depositions	$1,229.03
Reproduction Costs	$5,346.00
Total Allowed Costs	$6,675.03

An appropriate Order will be entered.

APPENDIX

	Lodestar	*Multiplier*		
Phase I	$ 4,478.50	1	=	$ 4,478.50
Phase II	$ 1,722.50	1	=	$ 1,722.50
Phase III	$ 1,745.00	1	=	$ 1,745.00
Phase IV	$36,711.50	2	=	$ 73,723.00
Phase V	$27,372.50	4	=	$109,490.00
Phase VI	$ 1,820.00	1	=	$ 1,820.00
Phase VII	$ 5,370.50	2	=	$ 10,741.00
Phase VIII	$ 1,560.00	1	=	$ 1,560.00
Phase IX	$ 1,453.00	1	=	$ 1,453.00
				$206,353.00

Fee Petition Preparation

	Compensable Hours	*Hourly Rate*			
Mr. Lanard	10	$65	=	$ 650.00	
Mr. Balter	42	$65	=	$2,730.00	
					$ 3,380.00
Total Attorney Fee Award					$209,813.00
Costs Awarded					$ 6,675.03

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTIONS
No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

No. 77-0619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 24th day of February, 1984, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that:

1. Plaintiffs' motion for attorneys' fees and costs is *granted* as follows:

a) Plaintiffs are *awarded* attorneys' fees in the *sum of $209,813.00.*

b) Plaintiffs are *awarded* costs in the *sum of $6,675.03.*

2. Defendants shall pay to Jerome Balter, Esquire, the petitioning attorney, the *total sum of $216,488.03 within thirty (30) days* of the date of this Order with interest to accrue thereafter until such time as payment is made.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

Entered 2-27-84
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1179 & 84-1208

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL., AMERICAN LUNG ASSOCIATION OF PHILADELPHIA, AND MONTGOMERY COUNTY, DELCHESTER LUNG ASSOCIATION, SIERRA CLUB, PENNSYLVANIA CHAPTER FRIENDS OF THE EARTH OF THE DELAWARE VALLEY, CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL, QUINN, KEVIN, FARRELL, KAYSI, WEISS, RUTH G., KLINKNER, JOHN, BIEZ, ELIZABETH S., SHULMAN, MONA

vs.

COMMONWEALTH OF PA., & TRAIN, RUSSELL E., Ind. & as ADMINISTRATOR of the ENVIRONMENTAL PROTECTION AGENCY, ET AL., SHERLOCK, WILLIAM T., Individually and as Secretary of the PA Dept. of Transportation, GODDARD, MAURICE K., Individually and as Secretary of the PA Dept. of Environmental Resources, SNYDER, DANIEL J., III, Individually and as Regional Administrator of the Environmental Protection Agency, Region III

(D.C. Civil 76-2068)

UNITED STATES OF AMERICA

vs.

COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION; THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

(D.C. Civil 77-619)

Commonwealth of Pennsylvania, Secretary of Pennsylvania Department of Transportation and Secretary of Pennsylvania Department of Environmental Resources,
Appellants in No. 84-1179

Delaware Valley Citizens' Council for Clean Air,
Appellant in No. 84-1208

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

(D.C. Civ. Nos. 76-2068 & 77-619)

Argued December 6, 1984

Before: ALDISERT, *Chief Judge,*
BECKER, *Circuit Judge,*
and STERN, *District Judge**

(Filed May 14, 1985)

JAMES D. CRAWFORD (Argued)
SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, PA 19103
Attorneys for Delaware Valley Citizens' Council for Clean Air, Appellees in No. 84-1179 and Cross-Appellants in No. 84-1208

SPENCER A. MANTHORPE
Chief Counsel

JOHN M. HRUBOVCAK (Argued)
Assistant Counsel
Dept. of Transportation
Harrisburg, Pa. 17120
Appellant in No. 84-1179 & Cross-Appellee in No. 84-1208

* Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This opinion addresses an appeal by the Commonwealth of Pennsylvania[1] from a large judgment for attorneys' fees and costs in favor of the Delaware Valley Citizens' Council for Clean Air (DVCCCA), pursuant to the attorneys' fee provision contained in §304(d) of the Clean Air Act (the Act), 42 U.S.C. §7604(d), in an action under the citizen lawsuit provision of the Act, 42 U.S.C. §7604(a). We also consider a cross-appeal by DVCCCA.

The underlying action was instituted by DVCCCA to compel Pennsylvania to meet federal air quality standards in several areas of the state. The litigation was ostensibly concluded in 1978 by entry of a consent decree establishing a program for the inspection and maintenance of automobile emissions systems in those geographic areas (the I/M program). After obtaining the consent decree, however, DVCCCA was confronted with prolonged and determined resistance by the Commonwealth and the Pennsylvania General Assembly to the decree's implementation, and its implementation was accomplished only after protracted, bitter, and highly publicized enforcement proceedings. These fee petition appeals relate only to work performed *after* entry of the consent decree.

[1] The appeal is also filed on behalf of the cabinet secretaries of two departments of Commonwealth government, the Department of Environmental Resources (DER) and the Department of Transportation (PennDOT). However, we shall refer to appellants collectively as "the Commonwealth."

While the appeals present a number of questions, the most important is whether attorneys' fees may be awarded for the work of DVCCCA's in-house counsel. Over the Commonwealth's objection, we will affirm the district court's award of fees for such work. Moreover, for the reasons that follow, we will affirm the judgment of the district court in all other respects as well.

I. BACKGROUND FACTS AND THE FEE PETITION RULING

The relevant facts surrounding the complex litigation underlying this attorney's fee request have very recently been summarized by this Court and need not be repeated here. *See DVCCCA v. Commonwealth of Pennsylvania,* 755 F.2d 38, 40-41 (3d Cir. 1985).[2] We will therefore turn directly to a brief description of the fee petition litigation itself.

In its petition to the district court for attorneys' fees and costs, plaintiff divided its request for compensation into nine phases.[3] The Commonwealth acceded to this

[2] For additional discussions of the legal and factual background of this litigation, *see* DVCCCA v. Commonwealth of Pennsylvania, 674 F.2d 970 (3d Cir.), *cert. denied,* 458 U.S. 1125 (1982); DVCCCA v. Commonwealth of Pennsylvania, 674 F.2d 976 (3d Cir.), *cert. denied,* 459 U.S. 905 (1982); DVCCCA v. Commonwealth of Pennsylvania, 674 F.2d 987 (3d Cir. 1982); DVCCCA v. Commonwealth of Pennsylvania, 678 F.2d 470 (3d Cir.), *cert. denied,* 459 U.S. 969 (1982).

[3] The Commonwealth appeals the award of fees for work done during five of these phases, and the award of a multiplier for work done during three others. The work performed during these phases is discussed *infra.*

approach, as did the district court, which made its fee award in terms of the nine phases.[4] The district court considered an extensive record and decided the fee petition application in a comprehensive opinion of some 40 pages. While we need not summarize the district court's opinion (the challenged portions are discussed *infra*), it is important to note that the court took much care in examining the fee petition and disallowed a significant number of claimed hours because it found them inadequately documented, duplicative, unnecessary, or excessive. The court awarded attorneys fees of $209,813.00 for work in the underlying litigation representing a lodestar of $82,-233.50 augmented by multipliers of two for phases IV and VII and four for Phase V.[5] The court then stayed its order pending appeal.

II. COUNSEL FEES UNDER THE CLEAN AIR ACT

This fee petition is brought pursuant to the Clean Air Act's counsel fee provision, §304(d), 42 U.S.C. §7604(d), which states:

[4] We approve the district court's exercise of discretion to treat the fee application in terms of phases of the case. *See* Institutionalized Juveniles v. Secretary of Public Welfare, Nos. 83-1696 & 83-1722 (3d. Cir. Mar. 26, 1985). As we noted in that case, slip op. at 44 n. 36, structural injunction cases such as this one, where the litigation proceeds in a number of discrete phases after the entry of an equitable decree, afford the district court flexibility to treat the litigation in separate categories for fee petition purposes if it so desires.

[5] It also allowed $3,380.00 for work on the fee petitions and $6675.03 in costs.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

In *Ruckelshaus v. Sierra Club*, 103 S.Ct. 3274 (1983), the Supreme Court held that "absent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees." *Id.* at 3281.[6] Plaintiff is eligible for attorneys' fees, therefore, only if it has achieved "some success on the merits."

If plaintiff meets this threshold eligibility requirement, it is entitled under §304(d) to an award of "reasonable" fees. This part of the Clean Air Act's attorneys' fee provision is consonant with the requirements of most other statutory attorneys' fee provisions, including 42 U.S.C. §1988, and we see no reason why the calculation of a reasonable fee for Clean Air Act purposes should differ from the same calculation that courts undertake pursuant to other provisions with the identical standard. Accordingly, we hold that the jurisprudence regarding the calculation of reasonable attorneys' fees developed in connection with other attorneys' fee statutes—particularly §1988—is applicable to cases brought pursuant to §304(d). This

[6] In *Sierra Club*, the Court specifically considered the fee award language of §307(f) of the Clean Air Act, 42 U.S.C. 7607(f). This language is identical to the language of §304(d), 42 U.S.C. §7604(d), which we consider in this case. The Court indicated that its holding applied with equal force to the award of attorney's fees under §304(d). *See* 103 S.Ct. at 3280-81.

includes the jurisprudence concerning the calculation of a lodestar, the determination of reasonable hourly rates, and the enhancement of a fee award based on the quality of the work. *See generally, Blum v. Stenson*, 104 S.Ct. 1541 (1984); *Institutionalized Juveniles v. Secretary of Public Welfare*, Nos. 83-1696 & 83-1722 (3d Cir. Mar. 26, 1985).

Having set forth the contours of the Clean Air Act's attorneys' fee provision, we now turn to a review of the challenged aspects of the fee award in this case.

III. FEES FOR SPECIFIC PHASES OF THE PROCEEDINGS

The district court included in the lodestar five categories of work (phases I, II, III, VI, and IX) for which the Commonwealth contends that fees cannot be awarded. Before we examine these contentions, we state two general propositions. First, we have no doubt that, by gaining implementation of the consent decree, plaintiff has achieved "some success" in its efforts and a fee award is therefore "appropriate" under §304(d) of the Act. We hold, therefore, that the work done in each of the five phases is compensable if the work contributed to DVCCCA's successful efforts to implement the consent decree.

Second, we point out that the district court made certain findings that bear generally upon the relationship between work in these phases and success in implementing the decree. The court stated:

> During the litigation and up until the present day, there has existed an intense adversarial atmosphere among all concerned parties. The defendants' presence has constantly been dominated by either a policy or an attitude that has tried to prohibit or delay the implementation of the I/M program in response to which the plaintiffs have constantly held fast to their position, without being totally inflexible. Additionally, plaintiffs have been required to partake in activities which, while not directly required under the consent decree, were sufficiently related to its goals and the ongoing litigation that such efforts should, and will be compensated for in some reasonable measure.

These findings, based upon the district court's nine-year experience in this case, are subject to the clearly erroneous rule. We conclude that they should not be disturbed.

We now consider whether the district court erred in awarding fees for work performed during the five phases at issue. Phase I involved the portion of the litigation that followed the Commonwealth's initial delay in promulgating proposed regulations for the I/M program as required by the consent decree. The Commonwealth objects to the award of fees for this work because it contends that DVCCCA acted in bad faith in refusing to negotiate what the Commonwealth considered a suitable extension of time for fulfillment of its obligations to publish the proposed regulations. The district court found that DVCCCA had not acted in bad faith, that its actions were appropriate, and indeed that a court order compelling compliance by the Commonwealth was required for the protection of DVCCCA's rights under the decree.

Phase II of the litigation primarily involved the submission by DVCCCA of comments to the proposed regulations that were required by the consent decree. The Commonwealth objects to the award of fees for this work because any person may submit comments on proposed regulations and the work was technical, rather than legal. The district court held that because DVCCCA was a party to the consent decree it had a special interest in commenting on the proposed regulations. The district court concluded that DVCCCA's efforts to ensure that the regulations were consistent with the consent decree should be compensated.

Phase III involved negotiations over a modification to the consent decree undertaken by the parties in the wake of legislative activity by the Pennsylvania General Assembly designed to thwart its implementation. The district court found that this work was necessitated by the Commonwealth's actions and was vital to the survival of the rights of DVCCCA and of the public under the consent decree.

We affirm the district court's decision to award fees for phases I, II, and III for the reasons stated by that court. DVCCCA's work during each of these phases contributed to its successful efforts to enforce the consent decree. The district court's findings are not clearly erroneous, and it correctly applied the law.

Phase VI involved plaintiff's successful opposition to the intervention of various Pennsylvania legislators in the underlying action. Defendants also opposed the attempt to intervene. The Commonwealth argues, therefore, that it should not have to pay the fees awarded for work on this phase, and that, if fees are to be awarded,

they should be assessed against the proposed intervenors. The district court concluded that the Commonwealth was liable for fees for three reasons: the identity of the legislators was not wholly independent from the identity of the executive; all branches of the Commonwealth were equally bound by the consent decree; and plaintiff's opposition to intervention was necessary for it to protect its rights thereunder.

The Commonwealth's position is not without force, but it is ultimately unpersuasive, because in this context we cannot parse out the roles and responsibilities of various branches of the state government. The intentions of the would-be intervenors were subsequently made clear by their instigation of the litigation leading to the Pennsylvania Supreme Court decision in *Scanlon v. Commonwealth of Pennsylvania*, 502 Pa. 577, 590, 467 A.2d 1108 (1983), which played a role in retarding implementation of the I/M program. As the district court indicated, plaintiff's work was necessary in its continuing struggle, resisted by various agencies of the Commonwealth at every turn, to implement the requirements of the consent decree; an award of fees is therefore appropriate.

Finally, the Commonwealth objects to the award of fees for work on phase IX of the litigation. During this phase, DVCCCA submitted an amicus brief in the *Scanlon* litigation in state court in opposition to an attempt by several members of the Pennsylvania General Assembly to prevent implementation of the I/M program; additionally, DVCCCA participated in EPA regulatory proceedings, opposing the Commonwealth's request to modify its state plan to provide for a reduced coverage area for the I/M program.

In regard to the latter portion of the work, the district court properly concluded that, because adoption of the state plan modification would have impaired the rights won by DVCCCA in the consent decree, an award of fees was proper. In regard to DVCCCA's work in state court, the district court concluded that DVCCCA had acted reasonably in deciding that involvement in the state court proceeding was important in vindicating its rights under the consent decree. We agree that the award of fees for this work was proper. By pursuing the battle in the state courts, plaintiff materially aided its position in defense of the consent decree. As with the intervention issue, DVCCCA acted reasonably in refusing to rely on defendants to promote DVCCCA's interests. Plaintiff's amicus brief thus contributed to its ultimately successful efforts to enforce the decree. We will therefore affirm the district court's fee award for phase IX.[7]

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[7] We note that the Supreme Court recently held in Webb v. Board of Educ. of Dyer County, Tenn., 53 U.S.L.W. 4473 (U.S. Apr. 16, 1985), that fees may be recovered under 42 U.S.C. §1988 for time spent by counsel pursuing "optional administrative proceedings," *id.* at 4474, so long as counsel's work "was both useful and of a type ordinarily necessary to advance the . . . litigation" to the point where the party prevailed. *Id.* at 4476. Application of the test is to be left to the discretion of the district court. *Id.*

Assuming *arguendo* that this test applies to counsel fee awards under the Clean Air Act and to time spent by counsel in state judicial as well as administrative proceedings, we conclude that the award of fees was appropriate for all phases in this case. The work by counsel in phase II, which involved informal state administrative proceedings, and in phases VI and IX, which involved state judicial proceedings, was useful and necessary for securing full enforcement of the decree. An award of fees was therefore appropriate under *Webb*.

IV. FEES FOR IN-HOUSE COUNSEL

James S. Lanard, who served as Executive Director of DVCCCA from 1978 to 1982, but who is also a member of the bar of this Court, entered his appearance and actively participated in the litigation in cooperation with DVCCCA's outside counsel, lawyers of the Public Interest Law Center of Philadelphia (PILCOP). The Commonwealth has objected to an award of fees to Lanard on the grounds that, because DVCCCA had outside counsel, Lanard was part of the client group. The district court, noting that Lanard entered an appearance in the litigation, that he was, in fact, the only individual working on many aspects of the case, and that he performed a large part of the activity for which compensation is sought, awarded counsel fees for Lanard's work. We will affirm.

As an initial matter, we agree with the Commonwealth that in-house counsel is not entitled to a court award of attorneys' fees for doing client work, such as furnishing information or documents to outside counsel. However, the record clearly reflects that Lanard's role was in fact that of a lawyer participating in the litigation. Lanard signed pleadings, performed legal research, wrote briefs, prepared for hearings and arguments, participated in proceedings before the district court, and presented oral argument to this Court.

The Commonwealth argues that the relevant rule of law is that which holds a pro se litigant ineligible for attorneys' fees. *See, e.g., Pitts v. Vaughn,* 679 F.2d 311 (3d Cir. 1982); *Cunningham v. FBI,* 664 F.2d 383 (3d Cir. 1981). In *Cunningham,* however, we specifically

left open the question presented by this case, i.e., whether a litigant represented by salaried in-house counsel may receive attorneys' fees. *Id.* at 385. Moreover, the Commonwealth's position against awarding fees to in-house counsel, in our view, conflicts significantly with the purposes of the citizen suit provisions of the Clean Air Act. A rule against reimbursement of in-house counsel would, by forcing the use of more expensive outside counsel, create a disincentive for any public interest or citizens group contemplating the institution of litigation to benefit the environment. Conversely, a rule in favor of such reimbursement would encourage litigants who seek to enforce the Act. We thus hold that attorneys fees may be awarded for the litigation activity of in-house counsel who has entered an appearance and played an active role in handling the litigation. Accordingly, we will uphold the district court's decision to award fees for the work of Lanard.

The Commonwealth also asserts that an award of fees to DVCCCA for some of Lanard's work would give rise to "double counting." As we have explained above, however, the district court properly and carefully reviewed any possible duplication of effort, noting that Lanard "performed a large part of all the activity for which plaintiff now seeks compensation." The amount of the counsel fee award for Lanard's activities will also be affirmed.

V. THE HOURLY RATES

In its cross-appeal, plaintiff contends that the district court did not set forth an explanation of its determination

of a reasonably hourly rate that allows us to conduct "careful appellate review." *See Ursic v. Bethlehem Mines,* 719 F.2d 670, 675 (3d Cir. 1983). Plaintiff asserts that "what little explanation there is suggests that the court gave inadequate attention to the experience and background of several of DVCCCA's attorneys and to the equivalent rates charged by lawyers in private practice."

The "explanation" of which plaintiff complains was given by the district court as follows. In its opinion, the court stated that it had evaluated the "status, reputation and experience of the individual attorneys who performed the [relevant] activity." The court stated that, in its view, $100 was a reasonable average hourly rate[8] for work that it found to be most difficult. For work that the court found could have been done by an attorney working at the associate level, an average hourly rate of $65 was applied. For work associated with legal work but which required little or no legal ability, the court granted an average hourly rate of $25.

Plaintiff argues that this "evaluation" was not sufficiently detailed and that the evaluation was not reflected in the hourly rate calculation. Plaintiff asserts that the court ignored the varying experience and expertise of DVCCCA's attorneys and disregarded the salaries earned by private attorneys with similar experience and expertise in equivalent litigation. More specifically, plaintiff complains that attorneys Albert Slap, Michael Churchill,

[8] Acknowledging that attorneys' fees rise over a period of time and that the period covered by the fee petition spanned five years, the court calculated an average rate for each type of work performed during the litigation.

Thomas Gilhool, and Jerome Balter were lawyers of great experience and stature who were entitled to high hourly rates, particularly in this complex and prolonged litigation that involved, in the district court's own estimation, new and novel issues. Plaintiff also points to higher hourly rates awarded to some of these same attorneys by judges of the District Court for the Eastern District of Pennsylvania in other litigation.

The Commonwealth rejoins by pointing to other evidence in the record of rates awarded by courts and charged by Philadelphia law firms in the general range awarded by the district court. The Commonwealth also submits that, to the extent that Gilhool and Churchill were awarded low rates, it was only for performing activities of marginal legal character for which no original legal analysis was required.

As an initial matter, we conclude that the district court did not abuse its discretion in fixing hourly rates of $100 for partner level work, $65 for associate level work, and $25 for work of only marginal legal character. We believe, however, that the court's decision to award the lower rates for certain hours presents a more difficult question, especially with respect to a small number of hours of the work of Gilhool and Churchill, both experienced and extremely able counsel. The district court justified its action (awards of $65 and $25 per hour for certain work) on the grounds that the work at issue—even though carried out by such accomplished advocates—was either at the associate level or was mundane or minor in character and that the attorneys were therefore not entitled to their normal rate. In *In re Fine Paper Antitrust Litigation,* 751 F.2d 562 (3d Cir. 1984), we reviewed

similar action by a district court, concluding that the district court did not abuse its discretion in reducing the rates for substantial amounts of partner time to associate level. *Id.* at 59193 ("the court's ruling . . . may be set aside only if predicated on clearly erroneous findings of fact or if it is so arbitrary and capricious as to amount to abuse.").[9]

We review the district court's action here under the same standard as in *Fine Paper*. Although the question is close, recognizing that the district court had intimate familiarity with the case and that it took great care in scrutinizing the fee petitions, we must defer to the court's conclusion that Balter was directing the litigation and that Gilhool and Churchill's services were, in some instances, either at the associate level or ministerial in character.[10] In sum, we hold that the district court did not abuse its discretion, and thus the court's decisions on hourly rates will be affirmed.

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[9] To the extent that senior attorneys counsel their younger associates as to strategy or evaluate the factual and legal positions of their client, the work of the senior attorneys should be compensated at partner rates. The record in this case, however, provides an insufficient basis for reversing the district court's award of fees on this basis, given its detailed knowledge of the case.

[10] The vast bulk of the work was performed by Balter and Lanard, both inexperienced attorneys. Balter was admitted to the bar in 1977 and Lanard in 1978 (when the litigation was already underway) and neither had any prior significant litigation experience. The fees awarded for their work, which constituted the vast bulk of hours involved, was plainly appropriate. A small number of hours were at issue for Slap and Beller, the latter also an inexperienced lawyer. The district court did not abuse its discretion in fixing the hourly rates for each of these attorneys.

VI. "THE SECOND CHAIR"

Plaintiff appeals the district court's disallowance of time spent by more than one attorney at hearings because "only one attorney spoke on behalf of the DVCCCA." Plaintiff concedes that multiple attendance at hearings may sometimes, or even often, be unnecessary, but asserts that the adoption of a *per se* rule that multiple representation is always unreasonable is arbitrary and incorrect. In plaintiff's view, the court ignored the underlying reasonableness of the common practice of attorneys to have more than one person present.

The course followed by the district court here was similar to that followed by the district court in *Fine Paper*. In that case we considered the district court's exclusion of fees for representation by more than one attorney at pretrial conferences and affirmed its decision under an abuse of discretion standard. *Id.* at 595. We conclude that the district court in this case carefully examined the need for the "second chair" at particular hearings, and that it did not abuse its discretion in denying fees therefor. We also conclude that denying fees for the "second chair" attorney does not conflict with the Clean Air Act. We will therefore affirm the district court's denial of fees for the "second chair."

VII. THE MULTIPLIER

We now turn to defendants' contention that the district court erred in making an upward adjustment of the

various lodestars. On this point the panel is in agreement as to what constitutes the controlling legal precepts, but divides on the question of application of these precepts to the facts found by the trial judge. Chief Judge Aldisert and Judge Stern affirm the district court; Judge Becker dissents in part for reasons set forth *infra* at note 12.

The majority believes that this was "the rare case where the fee applicant offer[ed] specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " *Blum v. Stenson,* 104 S.Ct. 1541, 1549 (1984). The increase of a lodestar is committed to the sound discretion of the district court, and this court "may not reverse where the trial court employs correct standards and procedures, and makes findings of fact not clearly erroneous." *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 116 (3d Cir. 1976) (in banc) *("Lindy II").* The appropriate inquiry, then, is whether in light of *Blum* the district court employed proper standards.

Blum involved review of a fee award under 42 U.S.C. §1983. In that case the district court increased the lodestar by 50 percent, citing as reasons the complexity of the litigation, the novelty of issues, the high quality of representation, the " 'great benefit' to the class, and the 'riskiness' of the law suit." 104 S.Ct. at 1548. The Supreme Court held that this recital of factors was insufficient to justify an upward adjustment of the lodestar. It reasoned that novelty and complexity of issues already are reflected in the lodestar, that only in a "rare case" where the fee appellant offers specific evidence to show the superior

nature of the services rendered and success was exceptional should quality of representation justify increasing the lodestar, and no evidence justified an increase based on the number of persons benefitted. *Id.* at 1548-49. As to contingency, the Court noted that the fee applicants did not identify any risks in their affidavits or brief to the district court and therefore an increase in the lodestar on this basis was unjustified. *Id.* The Court expressly left open the question of whether the risk of not being a prevailing party could ever justify a fee increase. *Id.* at 1550 n. 17.

This litigation centers on the Commonwealth's environmental plan, submitted 11 years ago, to conform with federal standards for carbon monoxide and ozone levels in the state's two metropolitan centers, greater Philadelphia and greater Pittsburgh. Nine years ago plaintiffs sued the state; two years later the state entered into a consent decree and then proceeded to renege on its provisions. To this day, every branch of government of the Commonwealth of Pennsylvania—the executive, legislative, and judicial—has fought tooth and nail every effort of plaintiff to make Pennsylvania respect the provisions of a federal statute.

It is certainly most unusual, and therefore a rarity, for a state government to have taken such devious formal actions to avoid the enforcement of a federal court order, as it did in this case:

> First, Pennsylvania's legislature enacted a state law deliberately designed to prohibit state officers from respecting the federal court order.
>
> Second, because the state then stood to lose $700,000 in Clean Air Act funds for state highways

in 1982, the legislators repealed the ill-fated legislation, and permitted the implementation of the inspection and maintenance program if necessary to avoid the loss of federal funds. *See DVCCCA v. Commonwealth of Pennsylvania,* 755 F.2d 38 (3d Cir. 1985).

Third, after receiving the federal funds for its highways because of compliance with the federal court order, the Commonwealth, acting through certain state legislators—desiring the financial benefits of federal largesse without intending to satisfy the federal requirements for it—successfully brought an action in its own court system, resulting in a judgment of the Supreme Court of Pennsylvania that called the federal court order "a nullity." *Scanlon v. Commonwealth of Pennsylvania,* 502 Pa. 577, 590, 467 A.2d 1108, 1115 (1983).

Undaunted, the public interest law firms representing the citizen group plaintiff returned to the federal court system and fought the powerful Commonwealth apparatus every inch of the way, through complicated detours and treacherous road blocks.

Although the district court described the case as presenting "new and novel issues, the resolution of which had little or no precedent," the court explained that counsel assisted the court in avoiding undue interference with essential elements of state sovereignty. Because this case involved a head on collision between two court systems, plaintiff was treading through a minefield. Nevertheless, plaintiff's counsel performed exceptional services in vindicating the dignity of the federal court system, walking the tight, and sometimes imperceptible, line that divides the competencies of two governmental sovereign-

ties, insuring full compliance with federal legislation designed for the safety and protection of the citizens, and vigorously battling a state governmental system that sought to defy a lawful order of this court system by resorting to discredited concepts of nullification, first by its legislature and next by its supreme court. To the majority, these circumstances are perfectly congruent with the bottom line expressed in *Blum* to satisfy the enhancement of the lodestar ordered by the district court.

The majority rejects the Commonwealth's arguments that the district court here applied standards prohibited by *Blum.* The court increased the lodestars in phases IV, V, and VII of the litigation based upon superior work, outstanding result, and contingency.[11] App. at 49. *Blum* did not foreclose all increases in attorneys' fees based on quality of work performed; it recognized that in a "rare case" a district court can justifiably increase a lodestar for "superior work." The district court found that the quality of plaintiff's counsel's work in phase V was "superior" and led to an "outstanding result." This finding is not clearly erroneous. An increase in the lodestar based on this factor is consistent with *Blum.*

The district court also found that the "contingent nature of plaintiffs' success" in phases IV, V, and VII supported an upward adjustment of the lodestar. This

[11] Work on phase IV became necessary when the Commonwealth attempted during the Spring of 1981 to delay implementation leading to the first appeal to this court. Phase V involved the litigation flowing from the General Assembly's law preventing the expenditure of funds for the I/M program. Finally, phase VII involved litigation over the Commonwealth's proposal that several programs be exempted from the contempt sanction imposed by the district court.

finding also is not clearly erroneous. Unlike *Blum*, plaintiff specifically identified the risks inherent in this litigation in its brief to the district court and, although the Supreme Court considers it an open question whether contingency of success can properly justify a lodestar increase, we have resolved the question in this court. *See Hall v. Borough of Roselle*, 747 F.2d 838 (3d Cir. 1984); *Lindy II*, 540 F.2d at 117.

The Commonwealth also contends that the district court did not make specific findings of fact in awarding the lodestar increase as required by *Ursic v. Bethlehem Mines*, 719 F.2d 670, 675 (3d Cir. 1983) and *Lindy II*, 540 F.2d at 117. The majority rejects this argument. The court expressly found: (1) the plaintiff's success was contingent because of the unusual nature of the litigation and "defendants' numerous attempts to overturn or circumvent this court's orders," app. at 49; and (2) the quality of plaintiff's counsel's work was superior in phase V due to the complex issues of federalism, app. at 49.

Finally, the Commonwealth contends that the district court abused its discretion in awarding such large multipliers. The majority rejects that argument as well. *Lindy II* is dispositive:

> The appellate court may not upset a trial court's exercise of discretion on the basis of a visceral disagreement with the lower court's decision. . . . "If the district court has applied the correct criteria to the facts of the case, then, it is fair to say that we will defer to its exercise of discretion."

Lindy II, 540 F.2d at 116 (quoting *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir. 1973) (in banc)), *cert. denied*, 419 U.S. 885 (1974). Because in awarding the multipliers the district court applied the correct criteria, and because the award was neither "'so unreasonable [n]or so arbitrary as to amount to a prejudicial abuse of . . . discretion,'" *Lindy II*, 540 F.2d at 116 (quoting *Napolitano v. Compania Sud Americana de Vapores*, 421 F.2d 382, 384 (2d Cir. 1970)), defendants' contention must fail.[12]

[12] Judge Becker dissents from the majority's affirmance of the district court's award of a contingency multiplier of two for phases IV and VII of the litigation. The work in phase IV was in opposition to the motion of the Commonwealth to amend a consent decree pursuant to Fed. R. Civ. P. 60(b), and the work in phase VII was its functional equivalent. *See supra* note 11. Judge Becker concludes that in awarding the contingency multiplier the district court failed to consider that the Commonwealth had to meet an extremely heavy burden to gain modification of the consent decree. *See, e.g.*, DVCCCA v. Commonwealth of Pennsylvania, 674 F.2d 970, 982 (3d Cir. 1982). In light of this burden, Judge Becker believes that the risk of lack of success in these phases was simply insufficient to justify the very substantial multiplier awarded by the district court.

Judge Becker also dissents from the majority's affirmance of the district court's award of a total multiplier of four for phase V of the litigation. He believes that this aspect of the fee award must be vacated and remanded to the district court for reconsideration in light of Blum v. Stenson, 104 S.Ct. 1541 (1984). Judge Becker acknowledges that *Blum* did not address the question of how high a multiplier the district court may award and that there are few cases that address this difficult issue. Nevertheless, he believes that because the *Blum* court carefully identified the cases in which fees may be awarded and characterized a 50 percent multiplier as "substantial," *id.* at 1548, *Blum* suggests that in only the rarest case would a total multiplier in the range of four be permitted. Judge Becker concludes that, even assuming an award of quality and contingency multipliers is appropri-

The judgment of the district court will be affirmed.

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ate as to phase V, the multipliers must be recalculated because the case was not so very rare as to justify in light of *Blum* the award of this extraordinary multiplier. *Cf.* New York State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1153-54 (2d Cir. 1983) (court considered the case to be "extraordinarily difficult," involving "novel questions of constitutional interpretation," and "equally complex issues concerning the litigation of institutional reform," yet the court reduced a multiplier from the 25 percent level awarded by the district court to 10 percent); Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208, 1217 (3d Cir. 1978) (district court abused its discretion in awarding a multiplier of two to account for contingency).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTIONS

No. 76-2068

DELAWARE VALLEY CITIZENS COUNCIL FOR CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., November 9, 1982

On August 29, 1978, the Commonwealth of Pennsylvania ("Commonwealth") and two of its administrative agencies voluntarily entered into a consent decree with the United States of America ("United States") and the Delaware Valley Citizens' Council for Clean Air ("DVCCCA"). In that consent decree, the Common-

wealth defendants agreed to establish an automobile emissions inspection and maintenance program ("I/M program") for the Philadelphia and Pittsburgh areas. On January 22, 1982, this Court found the Commonwealth in civil contempt for failing to implement the agreed upon I/M program. As part of its Order the Court imposed the following sanction:

> The Secretary of the United States ("Secretary"), or his designee, *shall not approve* any projects *or award* any grants under Title 23 of the United States Code in the Philadelphia or Pittsburgh Areas, . . ., other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, see 42 U.S.C. §7506(a);

Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania, 533 F. Supp. 869, 884-885 (E.D. Pa. 1982). That Order was affirmed on appeal. 678 F.2d 470 (3d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3339 (U.S. November 1, 1982) (No. 82-274).

Presently before the Court is a request by the Commonwealth for approval of federal funding for seven projects in the Philadelphia and Pittsburgh areas. The seven projects for which exemptions are sought are as follows:

Federal Project No.	Total Amt. of Project	Federal Funds	PennDOT Proposal Date	FHWA Approval Date	Basis of Exemption
PMS-GOOS(124)	$ 200,000	$ 200,000	7/27/82	9/17/82	Safety
PMS-OOS(128)	888,000	888,000	7/27/82	9/17/82	Safety
BRM-H014(1)	8,232,000	6,585,600	9/1/82	9/24/82	Safety
I-376-1(38)(0)	45,745,025	41,027,764	9/20/82	9/24/82	Safety
I-95-1(91)(14)	46,306,384	41,675,744	9/22/82	9/23/82	Safety & Air Quality
BRF-280(6)	40,575	32,460	9/20/82	9/29/82	Safety
SRS-2000(384)	100,000	90,000	9/20/82	9/29/82	Safety
	$101,511,984	$90,499,568			

On November 4, 1982, a hearing was held at which time the Court entered an Order staying any future awards until further Order of Court. For the reasons which follow, the Court will approve Federal Project Nos. PMS-GOOS (124) and PMS-OOS (128), and deny approval for Federal Project Nos. BRM-H014(1), I-376-1 (38) (0), I-95-1 (91) (14), BRF-280 (6), and SRS-2000 (384).

I.

On January 22, 1982, the Court entered its Order enjoining the award of federal highway funds to the Commonwealth as a sanction for the Commonwealth's failure to immediately implement an I/M program for the Philadelphia and Pittsburgh areas. Now the Commonwealth seeks to receive certain monies under the Court's express exceptions for safety and air quality improvement. Proper evaluations of the Commonwealth's present request requires scrutiny of the exceptions included in the Court's January 22, 1982 Order.

In framing the exceptions for safety and air quality improvement, the Court's purpose was to provide for prospective limited allowance for the funding of those certain projects which might arise and be necessary and principally intended to correct or improve existing safety hazards or existing air quality. In this way the Court sought to provide an exception which would protect the public from any unnecessary harm as a result of its Order. In order for a project to fall within the safety or air quality improvement exception in the context of considering an exemption to a contempt status, the Commonwealth has the burden of proving that the project's principal purpose is that of safety or air quality improvement.

The present sanction was patterned after section 176 (a) of the Clean Air Act, 42 U.S.C. §7506(a). That section provides in relevant part;

> §7506. Limitations on certain Federal assistance
>
> Approval of projects or award of grants
>
> (a) *The Administrator shall not approve any projects or award any grants authorized by this chapter and the Secretary of Transportation shall not approve any projects or award any grants under Title 23 other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, in any air quality control region—*
>
> (1) in which any national primary ambient air quality standard has not been attained,
>
> (2) where transportation control measures are necessary for the attainment of such standard, and
>
> (3) *where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1,1982).*

42 U.S.C. §7506(a) (emphasis added). The term "safety improvement project" is defined under Title 23 of the United States Code as follows: "[T]he term 'highway

safety improvement project' means a project which corrects or improves high hazard locations, eliminates roadside obstacles, improves highway signing and pavement marking, or installs traffic control or warning devices at high accident potential locations." 23 U.S.C. §101(a). Moreover, the terms "safety" and "air quality improvement" were defined by the Environmental Protection Agency ("EPA") and the United States Department of Transportation ("DOT") in a joint policy statement which sets forth the policy and procedures for meeting the federal assistance limitations in section 176(a) of the Clean Air Act. EPA/DOT Policy, 45 Fed. Reg. 24696 (April 10, 1980). These definitions are considered as factors by the Court in determining whether under all of the circumstances the certified projects meet the purpose and intent of the Court's Order finding the Commonwealth defendants in contempt, with exceptions for some safety and air quality improvements. That is, while the Court is not bound by these definitions because the Court's sanction was found necessary and entered under the Court's inherent power and duty to fashion a relatively reasonable yet effective remedy in civil contempt, nevertheless, the definitions are useful as a guide in reviewing the defendants' application to the Court at this time.

Under paragraph 2(c)(i) of the Court's Order of January 22, 1982, the Court imposed the requirement that the federal Secretary of Transportation, or his designee, certify in writing that any particular project approved or award granted be for safety or air quality improvement before any project or award could receive final approval by the Court as an exemption to the Court's January Order. 533 F. Supp. at 885. The certification requirement

was imposed by the Court as a mechanism to preliminary screen those projects which the Commonwealth believed might fall under the safety or air quality improvement exceptions. The Court is not required to gauge the "certification" by the Secretary in accordance with the often used "arbitrary and capriciousness" test usually applied in evaluating the performance of a member of the executive branch whose actions are subject to judicial review. In order to determine the standard that the Court should apply to the Secretary's action, it is appropriate and indeed necessary to consider the source from which the authority to certify comes. In statutes enacted by the Congress where it is the intent of the Congress to construct and improve the highway system, it is clear that the intent of the Congress in proffering the funds to do so through the Secretary, is to allow the Secretary to have the latitude and the discretion in the awarding of such funds to fulfill the Congressional purpose. Under such circumstances it is not only sensible but expected that in the absence of arbitrary or capricious conduct by the Secretary in carrying out the statutory function, his decision should be approved. Broad and liberal authority in the Secretary to carry out the Congressional purpose, coupled with the complexity of the task, makes it clear that he must have wide latitude in approving awards and grants where federal funds are to be employed. Here, however, the source of the Secretary's authority to certify grants to the Commonwealth of Pennsylvania does not arise out of a Congressional enactment mandating him to spend funds, but to the contrary, from a Court Order that prohibits him from spending funds and consequently his certification must be narrowly and strictly construed.

With the foregoing principles in mind the Court shall undertake to review the certified projects and determine whether the exceptions in its January 22, 1982 Order should apply to allow exemption of the funds in question. The Court notes that as longstanding and as enduring as our system of jurisprudence itself is, so too is the principle that the Court has broad discretion in fashioning and administering a remedy for civil contempt. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 678 F.2d at 478. The conditions and exceptions within that remedy are, of course, part of the remedy and as such, in this case, the party in contempt (the Commonwealth defendants) have the burden to prove that each project for which they now seek exemption from the remedy has as its *primary* purpose the safety and the improvement of air quality.

II.

(1-2)

Federal Project Nos. PMS-GOOS(124) and PMS-OOS(128) provide for the application of inlaid cold plastic pavement markings and the application of thermoplastic or epoxy markings for legends, arrows, crosshatching and long lines at critical locations. These markings will replace paint markings on specified streets and highways. Since the *only* function of the markings is to provide needed guidance to drivers, it is clear that the only purpose of these two projects is that of safety. Moreover, these projects specifically, by their very terms, fall within the Title 23 definition of a "highway safety improvement project" as they "improve . . . highway signing and pavement markings." 23 U.S.C. §101(a). Projects PMS-GOOS(124) and PMS-OOS(128) will therefore be approved by the Court.

(3)

Federal Project No. BRM-HO14(1) is designed to replace the Bloomfield Bridge in Allegheny County. The bridge was closed to all traffic four years ago after it was determined at an inspection that the bridge had severely deteriorated and could no longer carry vehicular traffic safely. Under the Court's guidelines, this project does not fall within the narrow safety exception of the January 22, 1982 Order. The bridge has been closed to the public and does not pose an immediate threat to safety. The fact that motorists are now inconvenienced or that a re-built bridge would provide a quicker or more comfortable or desirable or even shorter route to their ultimate destination than the present alternative route is immaterial to the question of whether the re-building of the bridge is a project which "corrects or improves a high hazard location." The Court will therefore deny approval for this project.

(4)

Federal Project No. I-376-1(38)(0) provides for various improvements to a 2.35 mile section of Interstate 376 in Allegheny County known as the Penn-Lincoln Parkway. The essential work to be performed on the proposed project is as follows: the construction of a new concrete roadway, the reconstruction of fourteen bridge decks, a permanent correction of a rock slope, the construction of new flood walls on the westbound lanes, the replacement of the existing metal median barrier with a new concrete barrier, the replacement of the existing curbing with new curbing, and the realignment of certain on-ramps. This

project is part of the general modernization plan for the 14.5 miles of I-376 now named the Parkway East.

The Commonwealth contends that the principal purpose for each improvement is that of safety. The Commonwealth cites statistical evidence which estimates that a twenty-one percent reduction in accidents would follow the completion of these improvements. There is no question that the existing highway, together with many others in the Commonwealth, are old and worn. However, the Commonwealth has failed to show that this 2.35 mile section of I-376 as it now stands constitutes an immediate hazard or threat of safety materially beyond that margin that is necessary to endure on any highway of similar vintage and condition. For example, the road surface is still usable even though it is somewhat outdated and worn. Second, each of the fourteen bridge decks, which are now proposed for reconstruction, have been determined to be in "fair" condition by the Pennsylvania Department of Transportation and have not been determined to be in imminent danger of being closed. Third, the rock slope has been temporarily stabilized and there is no immediate danger of a rock slide. Fourth, the construction of flood walls is only aimed at preventing closures of the highway during severe flooding by the Monongahela River which suggests more of a convenience and access concern than one *primarily* for safety. Fifth, the existing metal median barrier is adequate and safe when properly maintained. Finally, the Commonwealth has failed to demonstrate any immediate hazard with respect to the existing curbing or on-ramps.

Although notions of safety will surely be advanced by the construction of a new and modern roadway, the

Commonwealth has failed to demonstrate that the existing roadway presents an immediate and material safety threat. The statistical evidence presented by the Commonwealth with respect to perceived reduction of accidents is only a general estimate and of questionable weight within the context of the Court's standards being applied at this time. The 2.35 mile section of I-376 for which funding is now sought has not been shown by the Commonwealth to constitute a safety hazard entitled to exemption. General highway improvements, though they may carry with them coincidentally or collaterally improved safety benefits, are not enough to carry the day for an exemption from the sanction presently in force. The Court will therefore deny approval for this project.

(5)

Federal Project No. I-95-1 (91) (14) provides for the completion of the remaining section of I-95 consisting of 0.609 miles in the vicinity of Philadelphia International Airport. The principal purpose for this project is to complete the I-95 interstate system through Pennsylvania. The Commonwealth argues that the project is for safety and air quality improvement. The Commonwealth's argument is based on the fact that motorists using I-95 must now take a 2.7 mile detour in the vicinity of the airport due to the incompletion of the interstate system. Due to the high volume of use and the very nature of the detour, it is contended that the accident rate is 230 accidents per 100 million vehicle miles. The Commonwealth argues that if I-95 were to be completed, the accident rate would drop to 151 accidents per 100 million vehicle miles. Even assuming that these statistics are valid, the Court concludes that the Commonwealth has failed to meet its burden of proving

that the primary purpose for the project is one of safety. Furthermore, the Commonwealth has failed to show that the failure to complete this project now would result in an immediate hazard or danger to the public.

As noted previously, the construction of a new highway to replace an existing detour cannot be characterized as a correction of an existing high hazard location. Improvements with respect to the *detour* which can be readily cured by the Commonwealth from its own resources may be a safety concern to the Commonwealth, but that responsibility cannot be converted into approval of this grant that has as its principal purpose the completion of interstate I-95 and not to primarily address a safety hazard.

The Commonwealth has also failed to meet its burden of proving that the principal purpose for the completion of I-95 is for air quality improvement. The Commonwealth argues that the opening of I-95 would result in a substantial reduction in carbon monoxide emissions and hydrocarbon emissions because of the abandonment of the detour. The Court, however, finds the opposite to be true. The completion of I-95 may cause the detour to be abandoned, but it is perfectly plain that it would also encourage further motor vehicle use and thus would cause an increase in motor vehicle emissions. *See Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 533 F. Supp. at 833. Any decrease in auto emissions as a result of the closing of the detour would probably be cancelled by the transfer of the same as well as the likely increased traffic resulting from completion of I-95. Moreover, any improvement in air quality which would result by the completion of I-95 would be minimal when compared to the improvement in air quality that would result

by the institution of an I/M program, the absence of which is at the heart of the contempt from which this exemption is being sought. In view of the above, both with respect to the safety and air quality improvement exceptions, the Court will deny approval for this project.

(6)

Federal Project No. BRF-280(6) provides for the Commonwealth purchase of rights-of-way on both sides of two bridges over Park Creek and Little Neshaminy Creek, on County Line Road, in the Philadelphia area. It is fair to say that the purpose of the grant is to acquire land so that a further project to allow for the widening of the bridge at a future date may be pursued. This project is merely the first step in the construction of two wider bridges to replace existing narrow bridges. However, the existing bridges are reported by the Pennsylvania Department of Transportation to be in "fair" condition and, thus, do not present an immediate threat of safety to motorists who use those bridges. The Commonwealth has failed to demonstrate that the bridges constitute existing hazards which need immediate correction. For these reasons, the Court will deny approval of this project.

(7)

Finally, Federal Project No. SRS-2000(384) provides for the correction of a slide condition which has developed into an exposed cut slope near the intersection of Stotler Road and Universal Road in Allegheny County. The Commonwealth has presented no evidence of any accidents due to the slide condition or any evidence that would support a finding by the Court that the condition of the slide presents an immediate safety hazard. Rather, the con-

cern of the Commonwealth is that damage may result to a nearby gas line or nearby private property by reason of the slide. Since the Commonwealth has failed to meet its burden of proof, the Court will deny approval for this project.

III.

The Court has reviewed each of the seven projects certified to the Court and determined that approval should be granted for Federal Project Nos. PMS-GOOS(124) and PMS-OOS (128) and denied for Federal Project Nos. BRM-HO14(1), I-376-1(38) (0), I-95-1(91) (14), BRF-280(6), and SRS-2000(384). Under the Court's sanction, approximately ninety-one million dollars has been withheld from the Commonwealth under the 1982 fiscal year until such time as the Commonwealth complies with the terms of the consent decree. It is not likely from the Court's viewpoint that it is mere coincidence that the seven projects advanced by the Commonwealth and certified by the Secretary constitute the entire ninety-one million dollars presently withheld from the Commonwealth under the Court's contempt Order. Rather, it is the clearest evidence that every highway project has *some* safety feature lurking in its makeup. It would be an absurdity to try to formulate a plan or to submit a project which would have no safety element at all, or to decrease rather than maintain or increase safety. The Court believes that while the definition and application of the concept of "safety" may allow the defendants or even the Secretary to include every dollar on hand within its coverage in respect to their duty to their respective legislatures and constituents, it is another matter indeed to expect the Court in fulfillment of its duty under the existing Order to succumb to the same

temptation. For guidance in respect to the current application as well as future applications, the Court can be expected to consider exemptions favorably only when those projects have safety or air quality improvement as a material feature to their justification, as well as safety and air quality improvement as the principal purpose for which the project is deemed justified. Any inconvenience or deprivation to the citizens of the Commonwealth of Pennsylvania, other than within the exempt definition and resulting from the cut-off of the highway funds under the Court's Order, can be remedied in the manner suggested by the United States Court of Appeals for the Third Circuit in its decision affirming this Court's January 22, 1982 contempt Order when that court held:

> Any harm resulting to the citizens of Pennsylvania from a lack of federal highway funds can easily be brought to an end by actions of their elected representatives in the state legislature.

Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania, 678 F.2d 470, 478 (1982).

An appropriate Order will be entered.

OPPOSITION

BRIEF

1058-85-11550

Supreme Court, U.S.
FILED
AUG 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

RL11 PAGE 42

No. 85-5

In The
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1985

COMMONWEALTH OF PENNSYLVANIA et al.,

Petitioners

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR

and

UNITED STATES OF AMERICA,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Brief of Respondent Delaware Valley Citizens' Council for Clean Air in Opposition to Petition for Writ of Certiorari

James D. Crawford
Attorney for Respondent

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2162

QUESTIONS PRESENTED

1. Whether the award of multipliers in a pre-Blum v. Stenson case should be reviewed by this Court when the Court of Appeals determined that the fee awards were fully justified by specific evidence and findings which satisfied this Court's Blum standards.

2. Whether attorneys fees should be disallowed for two phases of complex litigation when those phases were necessary to the enforcement of the consent decree, which was the original object of the litigation.

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STATUTE:	
Clean Air Act of 1970, 42 U.S.C. § 7604	passim

COUNTER-STATEMENT OF THE CASE

In 1976, Delaware Valley Citizens Council for Clean Air ("DVCCCA") brought suit against the Commonwealth of Pennsylvania under 42 U.S.C. § 7604 ("Clean Air Act") to compel implementation of a federal air quality program for the inspection and maintenance of automobile emission systems ("I/M Program"). In 1978, Pennsylvania agreed to a final consent decree which established the I/M Program in ten counties in Pennsylvania. After winning the consent decree, however, DVCCCA was confronted with prolonged and determined resistance by Pennsylvania. As a result, DVCCCA was forced to engage in substantial activities to enforce the consent decree, for which it sought reasonable attorney's fees. In the interest

of convenience, the fee petition divided these activities into nine phases.

Upon considering an extensive record of this marathon litigation, on February 24, 1984 the district court awarded attorney's fees of $209,813.00 out of a requested fee of $336,305.50. The district court did not allow a significant number of claimed hours and set hourly rates lower than those prevailing in Philadelphia, but redressed those reductions on the fee in part by applying multipliers to three of the nine phases of the litigation.

Pennsylvania appealed the order, arguing, inter alia, that this Court's subsequent decision in Blum v. Stenson, U.S. , 104 S.Ct. 1541 (1984) required reversal of the multipliers. The court of appeals found that the correct

criteria under Blum were applied in formulating the fee award, and affirmed. DVCCCA v. Pennsylvania, 762 F.2d 272 (3d Cir. 1985).

ARGUMENT

I. Pennsylvania's Petition Raises No Questions Which Deserve Consideration by This Court.

Although the succeeding sections of this brief address the petitioner's questions on the merits, we begin by noting that those questions do not deserve attention by this Court under the standards of Supreme Court Rule 17.

The principal question raised by Pennsylvania in its petition for Writ of Certiorari is whether the increase of the plaintiff's lodestar conflicts with this Court's decision in Blum v. Stenson, U.S. , 104 S.Ct. 1541 (1984). The same

question was raised in the court of appeals and was thoroughly considered by that court. See DVCCCA v. Pennsylvania, 762 F.2d 272, Pet. App. at 46a (3d Cir. 1985). The standards established by this Court for the award of upward adjustments to attorney's fees were applied consistently with the Blum decision and in harmony with the decisions of other courts of appeals which have faced the same issue. Here, Pennsylvania is simply asking this Court to apply the same standards all over again, and there is no reason for the Court to do so. That is, the Court is not being asked to resolve new and important questions, but to correct what petitioners perceive as an error in applying the standards which the Court announced a year earlier.

Moreover, even if Blum could be seen as leaving open questions which may need to be resolved at some point, this is plainly the wrong case in which to do so. First, the questions may be resolved by a consensus of the courts of appeals, so that review by this Court would be unnecessary. Even if a conflict in circuits over the application of Blum were to develop, that in itself would better frame the issues for the Court's decision. At the very least, any decision of this Court seeking further to define the meaning of Blum should be made in the context of a record in which the trial court has awarded fees with awareness of Blum. The most that could be appropriate under the facts of this pre-Blum district court decision would be a remand to the district court so

that it could reevaluate its entire fee award in light of Blum and other fee award decisions which followed the trial court award, since the worst error that the district court could have committed would be to have failed to anticipate Blum and to articulate its decision in the terms of the Blum opinion.[1]

---

1. This is the fifth time that petitioners have sought relief from this Court, a record which indicates their litigation strategy that every question deserves this Court's attention. See DVCCCA v. Pennsylvania, 674 F.2d 676 (3d Cir.), cert. denied, 459 U.S. 905 (1982); DVCCCA v. Pennsylvania, 678 F.2d 470 (3d Cir.), stay denied, 458 U.S. 1125, cert. denied, 459 U.S. 969 (1982); DVCCCA v. Pennsylvania, 755 F.2d 38 (3d Cir. 1985), cert. pending, No. 84-1779.

II. In Affirming the Award of Multipliers to the DVCCCA, The Court of Appeals Gave Full and Correct Consideration to This Court's Decision in Blum v. Stenson.

In Blum, this Court expressly rejected the argument that upward adjustments of attorney fees are never appropriate. Indeed, the Court reiterated the rule that enhanced awards may be justified where there is "exceptional success" or where there is "specific evidence to show that the quality of services rendered was superior to that one reasonably should expect in light of the hourly rates charged." U.S. at , 104 S.Ct at 1549 (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)). On the basis of these very standards, both the district court and the court of appeals found that the upward adjustments

of attorneys' fees in the case at hand were reasonable and justified.

This case involved a complicated series of events which culminated in a head-on confrontation between two court systems. Throughout the nine years of litigation, plaintiff's counsel performed "exceptional services" in the face of treacherous detours and obstacles, with highly successful results. Because of this "superior work" and "outstanding result," the district court increased the lodestar for certain phases of the litigation.

As the court of appeals noted, the decision to award an upward adjustment under these circumstances was consistent with this Court's subsequent decision in Blum. See 762 F.2d at 280-82, Pet. App. at 63a-69a. Indeed, this was "the rare

case" contemplated in Blum where specific evidence showed "that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" See U.S. at , 104 S.Ct. at 1549.

Finally, the district court found that in addition to the "superior work" and "outstanding result" evidenced in this litigation, the contingent nature of DVCCCA's success in phases IV, V, and VII supported the upward adjustment to the lodestar. Petitioner argues that the district court's consideration of the contingency factor was improper under Blum and that on that ground, at least, the Court should reverse the decisions below. Petitioner is clearly wrong in this regard.

Nowhere does Blum suggest that contingency is an inappropriate consideration in awarding adjustments to attorney's fees. Indeed, the majority specifically refused to resolve that question. See U.S. at n.17, 104 S. Ct. at 1550 n.17. Furthermore, the Blum concurrence expressly would have held that the contingency of success is a proper basis on which to base fee adjustments. U.S. at , 104 S.Ct. at 1550. Numerous decisions of the courts of appeals stand in agreement with this view. See, e.g., Hall v. Borough of Rosselle, 747 F.2d 838 (3d Cir. 1984); Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980); City of Detroit v. Ginnell Corp., 495 F.2d 448 (2d Cir. 1974).

In this case, the propriety of the upward adjustment for contingency is particularly compelling. Respondent's success was conditional on the favorable resolution of complex legal issues, rather than the fortunate determination of factual disputes. Because petitioners engaged in such complex and unprecedented maneuvers to avoid the consent decree into which they had entered, respondent's claims involved the advocacy of difficult and important legal questions. Indeed, the likelihood that respondents would achieve such resounding success while avoiding any undue interference with state sovereignty seemed very slim, yet very important to those who seek to enforce agreements which a state makes in a federal court. Petitioners cannot complain that the courts

below rewarded respondent for overcoming the roadblocks thrown up by a tenacious and imaqinative adversary.

III. The Lower Court Correctly Awarded Attorney's Fees for All Aspects of This Litigation.

Finally petitioners attack the award of attorney's fees for Phase II (submission of comments concerning proposed regulations, publication of which was required by consent decree) and Phase IX (participation in EPA regulatory activity stemming from Pennsylvania's request to modify implementation plan). They make two arguments: first, that the awards were prohibited by the rule that a party may not recover attorney's fees for participation in administrative proceedings which precede court action, Florida Power & Light Co. v. Costle, 683 F.2d 941 (5th

Cir. 1982); and second that the activities which comprised the respective phases did not constitute "litigation" within the meaning of the Clean Air Act, and the awards were therefore inappropriate.

Because the court action in this case preceded the regulatory activity, the Costle rule is not applicable to this case. The second argument is equally without merit. All of the phases for which attorney's fees were awarded were merely interrelated aspects of the unitary attempt by respondent under the citizen suit provision of the Clean Air Act to compel enforcement of that act. These phases did not constitute separate claims, but separate steps in establishing a single claim against a variety of roadblocks.

CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

James D. Crawford
Attorney for Respondent

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103
(215) 751-2162

Dated: August 20, 1985

JOINT

APPENDIX

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-5
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners
vs.
DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

*JAMES D. CRAWFORD
Schnader, Harrison, Segal & Lewis
Suit 3600 1690 Market Street
Philadelphia, PA 19103
Phone: (215) 751-2162

Counsel for Respondent

JAY C. WALDMAN
General Counsel
Office of General Counsel

SPENCER A. MANTHORPE
Chief Counsel
Department of Transportation

JOHN W. CARROL
Acting Chief Counsel
Department of Enviromental Resources

JOHN M. HRUBOVCAK
Assistant Counsel
Department of Transportation

*JOHN P. KRILL
Deputy General Counsel
Commonwealth of Pennsylvania

Office of General Counsel
Commonwealth of PA
Post Office Box 11775
Harrisburg, PA 17108
(717) 783-6563

Counsel for Petitioners
*Counsel of Record

PETITION FOR CERTIORARI DOCKETED
JULY 3, 1985
CETIORARI GRANTED OCTOBER 7, 1985

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The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Memorandum and Order of the District Court dated November 9, 1982..... 71a-85a

Memorandum and Order of the District Court dated February 24, 1984..... 1a-45a

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DOCKET ENTRIES -- UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. 76-2068

DATE	Nr.	Proceedings
1976		
June 29,		Complaint filed.
1977		
Feb 16,		Stipulation & Order dd 2/16/77 that the complaint is dismissed as to federal defts, etc., filed. (2/17/77 entered & copies mailed.)
1978		
Aug 29,		Consent Decree granting injunction against defts' Commonwealth of Pennsylvania, Secty PennDOT & Secty.

of PennDER to enforce the inspection/maintenance regulation under Clean Air Act etc., filed.

1979		
Sept 21,		ORDER DD. 9/20/79, following HEARING in open Court, THAT THE MOTION OF PLFF. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR TO SHOW CAUSE WHY DEFT. SHOULD NOT BE HELD IN CONTEMPT IS DENIED, FILED.
1981		
Apr 29,		STATE DEFTS.' MOTION FOR MODIFICATION OF CONSENT DECREE. AFFIDAVIT OF KATY PHILLIPS AND MEMORANDUM IN SUPPORT. CERTIFICATE OF SERVICE FILED. (EXHIBITS ATTACHED).

May 1, PLFFS' MOTION TO DECLARE DEFTS IN VIOLATION OF THE CONSENT DECREE AS MODIFIED, TO MODIFY THE CONSENT DECREE, MEMORANDUM IN SUPPORT OF MOTION & CERT. OF SERVICE FILED.

May 21, MEMORANDUM, BECHTLE, J. & ORDER DD. 5/20/81 THAT THE STATE DEFTS' MOTION FOR MODIFICATION OF THE CONSENT DECREE IS DENIED. THE STATE DEFTS' MOTION TO STAY IMPLEMENTATION OF THE CONSENT DECREE IS DENIED. THE MOTION OF THE PLFFS. D.V.C.-C.C.A., TO DECLARE THE DEFTS IN VIOLATION OF THE CONSENT DECREE, AS MODIFIED & TO MODIFY THE CONSENT DECREE IS GRANTED IN PART AND DENIED IN PART, ETC. THE STATE DEFTS ARE DIRECTED TO FILE, BY 6/1/81, A PROPOSED PLAN PROVIDING FOR IMMEDIATE IMPLEMENTATION OF THE I/M

PROGRAM IN ACCORDANCE WITH THE CONSENT DECREE, ETC. HEARING ON THE STATE DEFTS' PROPOSED PLAN & ANY OBJECTIONS THERETO, AT 9:30 A.M.

June 16, MEMORANDUM, BECHTLE, J. & ORDER (DD.6/16/81) THAT DEFTS' MOTION FOR RECONSIDERATION OF ORDER OF 5/20/81 IS DENIED. THE COMMONWEALTH'S PROPOSED EMISSION INSPECTION & MAINTENANCE PROGRAM IS APPROVED, ETC., FILED.

June 30, Notice of appeal of defts. Commonwealth of Pa. & Pa. Dept. of Transportation, filed. Certified copy mailed to: Clerk, U.S.C.A. with certified copy docket entries copy mailed to all counsel of record.

July 14, ORDER DATED JULY 14, 1981 THAT DEFTS' MOTION FOR RECONSIDERATION OF THE ORDER OF JUNE 16, 1981 IS DENIED, FILED.

July 30, THE COMMONWEALTH'S MOTION FOR STAY PENDING APPEAL, MEMORANDUM IN SUPPORT THEREOF, & CERT. OF SERVICE, FILED.

Aug. 10, PLFFS, DVCCCA's MEMORANDUM IN OPPOSITION TO THE COMMONWEALTH'S MOTION FOR A STAY & CERT. OF SERVICE, FILED.

Aug 24, Plffs (DVCCCA et al) Petition for Attorneys' Fees, Affidavit of Jerome Balter, Esq. in support thereof & Cert. of Service, filed.

Aug 31, Response of Commonwealth of Pa., Dept. of Environmental Resources to plffs' Petition for Attorneys' Fees; & cert. of service, filed.

Sept 3, State Defts' Response in Opposition to plffs' Petition for Attorney Fees; & cert. of service, filed.

Sept 8, Deft's first set of interrogatories and request for production of documents, filed.

Sept 16, Supplementary Memorandum in support of Plffs., DVCCCA's Petition for Attorney Fees; & Cert. of Service, filed.

Sept 23, HEARING (ON 9/22/81) SUR MOTION FOR ATTORNEYS FEES -- DENIED WITH LEAVE TO REINSTATE THE MOTION UPON FURTHER COURT APPROVAL. THE COMMONWEALTH TO SUBMIT WRITTEN REPORT ON PROPOSED PUBLICITY PROGRAM BY 10/1/81. THE COMMONWEALTH IS DIRECTED TO SUBMIT A WRITTEN REPORT ON RECENT COMMENTS OF MANUFACTURERS REGARDING TECHNICAL OBJECTIONS WITH THE AUTO EMISSION ANALYZER BY 9/25/81, FILED.

Sept 23, ORDER DD. 9/24/81 THAT PLFFS' PETITION FOR COUNSEL FEES IS DENIED WITH LEAVE TO REINSTATE THE MOTION UPON COURT APPROVAL. FURTHER ORDERED THAT THE COMMONWEALTH IS DIRECTED TO SUBMIT A WRITTEN REPORT ON PROPOSED PUBLICITY PROGRAM BY 10/1/81. FURTHER ORDERED THAT THE COMMONWEALTH IS DIRECTED TO SUBMIT A WRITTEN REPORT ON RECENT COMMENTS OF MANUFACTURERS REGARDING TECHNICAL OBJECTIONS WITH THE AUTO EMISSION ANALYSER BY 9/25/81, FILED.

Oct 15, MOTION OF STATE DEFTS FOR STAY & FOR MODIFICATION OF THE CONSENT DECREE, MEMORANDUM & AFFIDAVIT IN SUPPORT OF STATE DEFTS' MOTION FOR STAY; & CERT. OF SERVICE, FILED.

Oct 19, PLFFS., DVCCCA'S MOTION TO DECLARE THE DEFTS IN CIVIL CONTEMPT & TO ESTABLISH SANCTIONS; MEMORANDUM & AFFIDAVIT IN SUPPORT OF MOTION & CERT. OF SERVICE, FILED.

Oct 29, Memorandum of plffs DVCCA et al in Opposition to defts' motion to stay & to modify the consent decree; & cert. of service, filed.

Oct 30, Memorandum of State defts in Opposition to Motion to Declare defts in Civil Contempt & to establish sanctions; & Cert. of Service, filed.

Dec 3, Memorandum of Commonwealth Dep. of Environmental Resources concerning the possible applicability of Article I, Section Ten of the U.S.C. to the instant action; & cert. of service, filed.

Dec 7, DVCCCA' memorandum concerning the unconstitutionality of Section 2 HB 456 (10-5-81) under the contract clause of the U.S. Constitution,

1982

Jan 22, MEMORANDUM, BECHTLE, J. & ORDER THAT DEFTS' MOTION TO STAY & MODIFY THE CONSENT DECREE IS DENIED. THE COMMONWEALTH OF PA., THE SECRETARY OF PA. DEPT. OF TRANSPORTATION, & THE SECT'Y. OF THE PA. DEPT. OF ENVIRONMENTAL RESOURCES ARE HEREBY DECLARED TO BE IN CIVIL CONTEMPT, ETC., FILED. 1/22/82 ENTERED & COPIES MAILED.

Feb 8, Notice of Appeal of defts, Commonwealth of Pa., Secretary of Pa. Dept. of Transportation & Secretary of Pa. Dept. of Environmental Resources, filed. (U.S.-C.A. No. 82-1104)

Apr 6, Certified copy of judgment in lieu of formal mandate received from U.S. Court of Appeals affirming the Orders of this District Court dd. 5/20, 6/16 and 7/14/81. Costs taxed against appellants. Costs taxed in favor of appellees, Delaware Valley Citizens' Council, et al in the sum of $247.50, & Costs taxed in favor of Appellee, U.S.A. in the sum of $42.65, filed. (to Bechtle, J. w/cy U.S.C.A opinion) (re U.S.C.A. #81-2302)

June 24, Certified Copy of judgment in lieu of formal mandate received from U.S. Court of Appeals. The Order of this District Court, declaring Commonwealth defts. to be in contempt of the consent final judgment, & enjoining the U.S. Sect'y. of Transportation from approving certain projects or awarding certain funds until the Commonwealth is in compliance, entered 1/22/82 be & the same is hereby affirmed. Costs taxed against appellants, filed. (RE: 81-2303 & 82-1104)

Oct 22, Copy U.S.'s certification of Projects pursuant to Court Order of 1/22/82; & Cert. of Service, filed.

Nov 1, Memorandum of DVCCCA in re Highway Projects certified to the Court on 10/12/82 by the designee of the U.S. Secty. of Transportation; & cert. of service, filed.

Nov 5, ORDER DD. 11/5/82 THAT THE AWARD OF THE GRANTS FOR THE SEVEN HIGHWAY PROJECTS PRESENTLY CERTIFIED BY THE SECRETARY OF TRANSPORTATION TO BE FOR SAFETY AND/OR AIR QUALITY IMPROVEMENT OR MAINTENANCE, OR BOTH, TO THE COMMONWEALTH OF PA., OR ITS ADMINISTRATIVE AGENCIES, IS HEREBY STAYED UNTIL FURTHER ORDER OF COURT PURSUANT TO PARAGRAPH 2(c)(v) OF THE COURT'S ORDER OF 1/22/82, FILED. 11/5/82 entered & copies mailed.

Nov 9, MEMORANDUM, BECHTLE, J. & ORDER THAT COURT APPROVAL FOR FEDERAL PROJECT NOS. PMS-GOOS(124) & PMS-OOS(128) IS GRANTED. COURT APPROVAL FOR FEDERAL PROJECT NOS. BRM-H014(1), I-376-1(38)(0), I-95-1(91)(14), BFR-280(6), & SRS-2000(384) IS DENIED. THE SECRETARY

OF THE U.S. DEPT. OF TRANSPORTATION, OR HIS DESIGNEE, SHALL NOT AWARD ANY GRANTS FOR FEDERAL PROJECT NOS. BRM-H014(1), I-376-1(38)(0), I-95-1(91)(14), BRF-280(6), & SRS-2000(384), FILED.

11/10/82 entered & copies mailed.

1983

Jan 6, Notice of Appeal of defts Commonwealth of Pa., Secretary of Pennsylvania Dept. of Transportation & Secretary of Pa. Dept. of Environmental Resources, filed.

May 6, STATE DEFTS MOTION TO VACATE THE ORDER OF CONTEMPT OF 1/22/82 & TO MODIFY THE CONSENT DECREE, AFFIDAVITS OF HAROLD NANOVIC, ET AL, &

MEMORANDUM & DEFTS' MEMORANDUM OF LAW IN SUPPORT THEREOF, & CERT. OF SERVICE, FILED.

May 16, Delaware Valley Citizens' Council for Clean Air Memorandum in response to the Commonwealth's Motion: (1) To Vacate the Civil Contempt Order of 1/22/83; & (2) To Modify the Consent Decree; & cert. of service, filed.

May 17, ORDER DD. 5/16/83 THAT THE EMISSION INSPECTION AND MAINTENANCE PLAN SUBMITTED BY THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION IS APPROVED; THE MOTION TO VACATE THE ORDER OF CONTEMPT OF 1/22/82, & TO MODIFY THE CONSENT DECREE IS GRANTED, FILED.

June 6, Delaware Valley Citizens' Council for Clean Air, Plffs' PETITION FOR ATTORNEY FEES & COSTS & CERT. OF SERVICE, FILED.

June 20, Defts' Commonwealth of Pa., Dept. of Transportation, First Set of Interrogatories & Request for Production of documents directed to plffs.; & Cert. of Service, filed.

July 18, ORDER DD. 7/18/83-re discovery on the motion of Delaware Valley Citizens' Council for Clean Air for Attorney Fees & Costs. Further Ordered that there will be a hearing on said motion of 9/30/83 at 9:30 a.m. in Crtrm. 17B, filed. 7/19/83 entered & copies mailed.

Sept 19, Pa. Dept. of Transportation's Response in Opposition to Delaware Valley Citizens' Council for Clean Air's Petition for Attorney Fees and Costs, Certificate of Service, filed.

Oct 5, Delaware Valley Council for Clean Air, et al's reply to Commonwealth's response in RE DVCCCA Petition for Attorney Fees and costs, certificate, filed.

Oct 7, Argued Sur; Hearing of 10/7/83 Re: Deft DVCCCA's Motion for Attorney Fees and Costs, C.A.V. filed.

Oct 13, Plff. DVCCCA's Supplementary Memorandum in Re DVCCCA Attorney Fee Petition, Certificate of Service, filed.

Oct 19, Pa. Dept. of Transportation, et al's Supplemental Response to Petition for Attorney Fees; & cert. of service, filed.

1984

Feb 24, MEMORANDUM, BECHTLE, J. & ORDER DD. 2/24/84 THAT PLFFS MOTION FOR ATTORNEYS' FEES & COSTS IS GRANTED AS FOLLOWS:

PLFFS ARE AWARDED ATTORNEYS' FEES IN THE SUM OF $209,813.00. PLFFS ARE AWARDED COSTS IN THE SUM OF $6,675.03. DEFTS SHALL PAY TO JEROME BALTER, ESQ., THE PETITIONING ATTORNEY, THE TOTAL SUM OF $216,488.03 WITHIN 30 DAYS OF THE DATE OF THIS ORDER WITH INTEREST TO ACCRUE THEREAFTER UNTIL SUCH TIME AS PAYMENT IS MADE, FILED. 2/27/84 ENTERED & COPIES MAILED.

Mar 22, DEFT Commonwealth of Pa., Secretary of Pa. Dept. of Transportation & Secretary of Pa. Dept. of Environmental Resources's Notice of Appeal, filed. (USCA No. 84-1179)

Apr 6, Delaware Valley Citizens' Council for Clean Air, et al's Notice of Cross-Appeal, filed. (USCA 84-1208)

1985

May 14, Ct. of Appeals affirms order of Dist. Ct. (C.A. 84-1179 and C.A. 84-1208).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR

CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., May 20, 1981:

In 1976 and 1977, the Delaware Valley Citizens' Council for Clean Air ("DVCCCA") and the United States, respectively, each brought a civil action to compel the Commonwealth of Pennsylvania and two of its agencies to establish a program for the inspection and maintenance of automobile emissions systems ("I/M program"), which the plaintiffs contended was required by federal law. See 42 U.S.C. §7410c-5(c)(1)(B). At length, the parties entered into a consent decree, approved by this Court on August 29, 1978, which provided for the establishment, either by legislation or regulation, of an I/M program in Pennsylvania. As subse-

quently modified, that decree provided that the Commonwealth would commence inspections on May 1, 1980.

Presently before the Court are two motions filed by the Commonwealth. The first motion seeks a modification of the consent decree to provide for a further postponement of the I/M program's full implementation until January 1, 1983. The Commonwealth's second motion seeks an order staying the implementation of the I/M program pending the Court's determination of the motion for a modification of the decree. Both motions will be denied.

The Commonwealth's principal ground for seeking the delay is that, by waiting the additional 20 months, a more advanced emissions system analyzer, using

a computer, will be available for use in the I/M program. The new computer analyzer, which is more expensive, is not now available and, though presumably more accurate than the less expensive available analyzer, the degree of added accuracy is neither necessary nor required by the United States Environmental Protection Agency ("EPA). All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting gas stations to buy, are adequate to fulfill the needs of the I/M program.

The parties submitted legal memoranda and a hearing was held on May 6, 1981, on the Commonwealth's motions. In addition, the EPA, at the Court's request, submitted a brief report on the current air quality in the Philadelphia and Pittsburgh regions of the state.

The report demonstrates that, while air quality in the two regions is improving or presently adequate in respect to some EPA standards, it continues to be wholly inadequate in respect to other EPA standards. For example, the ozone level in the Pittsburgh area not only fails to meet the standard, but has become worse over the past two years. In the Philadelphia area, the ozone level, while decreasing, is still at nearly twice the concentration permitted by the EPA standard. See EPA Report, Charts 1-5.

Therefore, upon consideration of the arguments of the parties and the EPA report, the Court has concluded that, notwithstanding the possible advantages of using the computer analyzer, the Commonwealth must establish the I/M program as set forth in the consent decree--without further delay.

Also before the Court is a motion filed by plaintiff DVCCCA requesting the Court to declare the defendants in violation of the consent decree, as modified, and to modify the consent decree. The modification sought would largely place supervision of the I/M program in the hands of the DVCCCA. Although the Commonwealth's delay in establishing the I/M program is disappointing and in large measure inexcusable, the Court does not believe that there are sufficient grounds at this time to either consider further or allow in whole or in part the drastic revision of the program proposed by the DVCCCA. Therefore, the motion of the DVCCCA will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR

CLEAN AIR, et al.

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COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 20th day of May, 1981, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. The state defendants' motion for modification of the consent decree is denied.

2. The state defendants' motion to stay implementation of the consent decree is denied.

3. The motion of the Delaware Valley Citizens' Council for Clean Air to declare the defendants in violation of the consent decree, as modified, and to modify the consent decree is granted in part and denied in part: (A) This motion is granted insofar as it seeks to have the defendants declared in violation of the consent decree, as modified,

and the Court so declares; and, (B) the motion is denied insofar as it seeks a modification of the consent decree.

4. The state defendants are hereby directed to file with the Clerk of Court and serve, on or before June 1, 1981, a proposed plan for the Court's consideration, providing for the immediate implementation of the I/M program in accordance with the consent decree. Any objections thereto shall be filed with the Clerk of Court and served on or before June 8, 1981.

5. There will be a hearing on the state defendants' proposed plan, and any objections thereto, at 9:30 a.m.,

June 10, 1981, in Courtroom 17B, United States Courthouse, Philadelphia, Pa.

(s) Louis C. Bechtle

Louis C. Bechtle, J.

Entered: 5-21-81

Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR

CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

MEMORANDUM AND ORDER

BECHTLE, J., June 16, 1981:

Presently before the Court is the Commonwealth's proposed Emission Inspection and Maintenance Plan, together with objections of the plaintiffs Delaware Valley Citizens' Council for Clean Air ("DVCCCA"), the United States of America and the Environmental Protection Agency ("EPA"), filed in response to the Court's Order of May 20, 1981. On May 20, the Court declared that defendants Commonwealth of Pennsylvania and the Secretaries of the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Department of Environmental Resources ("PennDER") were in violation of the Consent

Decree in which defendants had agreed to establish an automobile emissions inspection and maintenance program ("I/M program") for the five-county Philadelphia and Pittsburgh areas to have commenced on May 1, 1981. Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania, Nos. 76-2068, 77-619 (E.D. Pa., May 20, 1981). On June 10, 1981, the Court held a hearing regarding the proposed plan. The Commonwealth's proposed emissions I/M program will be approved subject to the following modifications:

I. Implementation of the Emissions I/M Program

First, the Court approves the Commonwealth's proposal to use the BAR-80 emissions analyzer with an

automatic data collection system. The BAR-80-ADC equipment is preferable to the BAR-74 equipment because of its superior increased cost efficiency and reporting accuracy, as well as its more certain adaptability to the testing of auto emissions for compliance with the new car warranty required by Section 207(b) of the Clean Air Act, 42 U.S.C. §7541(b).

Second, the Court believes that the I/M program can be fully implemented by May 1, 1982, through a sincere effort on the part of the Commonwealth and the cooperation of all parties involved.

The defendants have asserted in open court their sincere desire and interest in going forward with this program. Although certain of the plaintiffs challenge the sincerity of these declarations, the Court believes that

they have been made by the defendants responsibly and in good faith. If the Court is correct, the manner in which the defendants enter upon their obligations under this Order will soon be apparent and it is from there that it will be easily determined whether or not the Court's confidence and expectations have been well placed. The defendants surely have the resources, skill and the personnel to carry out what they say is their earnest goal. Time is the real test and, for the purposes of this phase of this litigation, it commences at this time.

Third, defendants have informed the Court that 2,274 inspection facilities have already been certified under Phase I of the I/M program to date. Phase II of the certification process, which requires that each station pur-

chase the approved emissions analyzer and hire a certified emissions mechanic, has yet to be completed. Since the Commonwealth has for some months been prepared for the training of certified emissions mechanics and the certification of new inspection stations, the Court finds that it is reasonable to require that the Commonwealth certify at least 3,000 inspection stations by the date of the implementation of this program--May 1, 1982.

II. Program Quality Assurance

Schedule B, §1(D) of the Consent Decree of August 30, 1978, requires that the Commonwealth and PennDOT commence the development and implementation of standards, procedures and regulations with respect to the "periodic on-site visits by the Commonwealth to inspection

facilities, instrument calibration checks, and inspection of records." This provision was later modified to read that "periodic visits shall be unannounced and occur at least once every three (3) months for each inspection facility, unless the quality control procedures are modified pursuant to paragraphs 4, 6 and 8 of this schedule." Modification of Consent Decree, March 7, 1980, sch. S. ¶1(D). Accordingly, ¶¶4, 6 and 8 require that the Commonwealth prepare a study for review by plaintiffs on the cost-effectiveness and quality of monthly on-site inspections, as opposed to the Commonwealth's proposed quarterly visitations. The aforementioned modifications to the Consent Decree specifically provide that "[p]laintiffs re-

serve the right to challenge any such procedures which are not as effective as the results of monthly on-site visits by the Commonwealth." Modification of Consent Decree, March 7, 1980, sch. B, ¶8 (emphasis added). On July 31, 1980, PennDOT submitted the required study of quality control procedures to the EPA. PennDOT proposed a system of quarterly visitations and audits of the inspection facilities. However, the EPA report on the Pennsylvania Proposed I/M Surveillance System, issued on September 23, 1980, outlined numerous deficiencies and inadequacies of the proposed surveillance system. EPA strongly recommended that the Commonwealth adopt a system of monthly audits, which in the opinion of the EPA would still remain cost effec-

tive. In light of this report and the inadequacy of the quarterly visitations proposal demonstrated therein, this Court finds at this time that the proposed quarterly visitation program would not be "as effective as the results of monthly visits." Therefore, the Court will require defendants to implement a quality assurance program consisting of monthly audits and visitations of the certified emissions I/M stations. Should it be demonstrated from the results of experience following full implementation of this program that actual events warrant a change in the program, alternative programs will be considered by the Court.

III. Consumer Protection Mechanism

The Consent Decree, as modified, states that defendants will "[s]ubmit to Plaintiffs adopted policies for providing, as a consumer protection mechanism, facilities where official confirming inspections may be conducted independent of certified private garages (i.e. at least one facility in the Philadelphia area and one facility in the Pittsburgh area as the base system, with operation of other facilities at the sole discretion of PennDOT), or an equally effective alternative, such as timely consumer complaint investigations by Commonwealth employees." Modification of Consent Decree, March 7, 1980, sch B, ¶9 (emphasis added). The Commonwealth

proposed to implement a consumer protection mechanism which involves a Central Complaint Office from which field investigators would investigate submitted complaints and possibly arrange vehicle emissions retesting or analyzer checks if deemed necessary. This Court believes, however, that it is extremely important that the I/M program be effective, which will include acquiring the confidence of citizens in the affected areas. Therefore, the Court finds that common sense dictates that the Commonwealth's proposed Central Complaint Office procedure would not rise to the level of "an equally effective alternative" as that of at least one official confirming inspection station in both the Philadelphia and Pittsburgh areas, as described in sch. B, ¶9 of the modified Consent Decree.

The Court is simply convinced that, in the absence of demonstrable evidence to the contrary, a change in the originally envisioned mode is not warranted now. Therefore, the Court will require that the Commonwealth maintain at least one independent inspection facility in each of the Philadelphia and Pittsburgh areas as a base system for handling consumer complaints in those two widely separated areas. Should it be demonstrated at a later time that an alternative system would be just as effective in light of experience under the program, the Court will reconsider this matter.

IV. Reporting Requirements

Section 11 of the original Consent Decree requires that PennDOT submit specified quarterly reports to the plaintiffs "for the purpose of

insuring compliance with this Consent Decree." Consent Decree, August 29, 1980, ¶11. PennDOT will still be required to provide these reports to plaintiffs. Such reports shall specifically outline the progress of defendants in implementing the I/M program.

Second, this Court will require that PennDOT submit progress reports to this Court on the fifth and fifteenth of every month hereafter or the first business day following such day if such date is a Saturday, Sunday or holiday, in order that the Court can effectively monitor the implementation of the approved I/M program. These reports will be required, effectively immediately, and shall continue through December, 1981.

V. Conclusion

It has been almost three years from the date of the entry of the Consent Decree in which defendants agreed to implement an I/M program; yet we find that the Commonwealth has still failed to implement the agreed-to program. This program is vital to achieving federally established standards of air quality in the Philadelphia and Pittsburgh regions. The parties, by their consent in the current Decree, as well as their unanimous declaration in court that the program is to go forward, have acknowledged that the observance of these air quality standards are necessary to maintain the health and well-being of the residents in the Phila-

delphia and Pittsburgh areas. Since the Court anticipates the cooperation and best efforts of the Commonwealth and PennDOT in implementing this program, the Court will withhold a ruling at this time on plaintiffs' request for the imposition of sanctions for failure to comply with the approved program. An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 76-2068

DELAWARE VALLEY CITIZENS' COUNCIL FOR

CLEAN AIR, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

and

Civil Action No. 77-619

UNITED STATES OF AMERICA

v.

COMMONWEALTH OF PENNSYLVANIA, et al.

ORDER

AND NOW, TO WIT, this 16th day of June, 1981, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. Defendants' motion for reconsideration of the Court's Order of May 20, 1981, is denied for the reasons stated by the Court at the June 10, 1981, hearing.

2. The Commonwealth's Proposed Emission Inspection and Maintenance Program I is approved, except as modified hereinafter by this Order.

3. Pursuant to sch B, §§1(D), 4, 6 and 8 of the Modified Consent Decree of March 7, 1980, defendants shall promulgate and implement standards, procedures and regulations pertaining to monthly audits and monthly on-site visitations of the certified emissions inspection and maintenance

stations. Monthly audits will be required until such time, following the full implementation of the I/M program, as the Court finds that experience under the program warrants a change.

4. Pursuant to sch B, §9 of the Modified Consent Decree of March 7, 1980, defendant: ts shall promulgate and implement standards, procedures and regulations pertaining to the establishment of official confirming inspection stations for consumer protection, at least one of which shall be in the Philadelphia area and one of which shall be in the Pittsburgh area, with establishment of additional facilities at the sole discretion of defendants. Such a consumer protection program will be required until such time, following

the full implementation of the I/M program, as the Court finds that experience under the program warrants a change.

5. Pursuant to §11 of the Consent Decree of August 29, 1978, defendants shall submit specified quarterly reports to plaintiffs which set forth the state of progress in the Commonwealth's implementation of the I/M program.

6. Effective immediately and through December, 1981, defendants shall file progress reports with the Clerk of Court on the first and fifteenth of each and every month (or the first business day following such dates if such date is a Saturday, Sunday or holiday). Such

reports shall detail the progress of each of the items shown on defendants' submitted Emission Inspection Program I (Recommended Plan).

7. Subject to the Decree, previous Order of this Court and the within Order, the proposed schedule of defendants for the implementation of the I/M program is hereby approved and its operation shall commence on May 1, 1982, subject to such further Order of this Court as may from time to time be made.

8. Defendants shall certify a minimum of 3,000 inspection stations in order to effectively implement this program.

9. Subject to the expectations of the Court that its Orders to date, including the within Order, will be

complied with by the defendants, the Court will withhold a final ruling on plaintiffs' request for impositions of sanctions at this time.

(s) Louis C. Bechtle

Louis C. Bechtle, J.

Entered 6-17-81

Clerk of Court

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et, al., Plaintiffs	:	CIVIL ACTIONS
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, et, al., Defendants	:	NO. 76-2068
	:	and
UNITED STATES OF AMERICA Plaintiff	:	
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, et al, Defendants	:	No. 77-619

PLAINTIFFS' PETITION FOR ATTORNEYS' FEES

Plaintiff's Delaware Valley Citizens' Council for Clean Air et al. (DVCCCA), and their attorney, Public Interest Law Center of Philadelphia (PILCOP) hereby Petition this Court for an award of reasonable attorney fees to

be paid by the defendants, Commonwealth of Pennsylvania et al., as permitted under Section 304(d), Clean Air Act 42 U.S.C. 7604(d). In support of this Petition counsel for DVCCCA respectfully submits the following:

I. HISTORY OF THE CASE

-A-

This case was commenced by the filing of a citizens' lawsuit by the DVCCCA on June 29, 1976, C.A. #76-2068, under the Clean Air Act, 42 U.S.C. 7401 et seq. The complaint alleged that the defendants, Commonwealth of Pennsylvania et al., were in violation of the Clean Air Act for failure to implement a motor vehicle emission inspection and maintenance (I/M) program as required by the Pennsylvania State Implementation Plan (SIP), 40 CFR 52.2038. The original complaint also named the Administrator of the United States Environmental Protection Agency (EPA) as a defendant for violating his duty to enforce the Pennsylvania SIP as required by Section 113, 42 U.S.C. 7413. The

citizens' lawsuit was initiated under jurisdiction of Section 304, 42 U.S.C. 7604.

Subsequent to the filing of the citizens' lawsuit the DPA agreed to file its own action against the defendants, Commonwealth of Pennsylvania et al., for violation of the SIP, C.A. #77-619 and the EPA was dismissed as a defendant in the original action. The two actions were then consolidated.

After discovery negotiations among the parties a Consent Decree was reached and it was approved by this Court on August 29, 1978. The Consent Decree obligated the Commonwealth to implement the mandatory inspection/ voluntary maintenance phase of the I/M program by August 1, 1980 and the mandatory inspection/mandatory maintenance phase of the program by February 1, 1981.

As part of the Consent Decree the Commonwealth agreed to pay plaintiffs $30,00 to cover attorney fees and costs (Consent Decree, para. 8) and EPA paid $8,700 to DVCCCA in settlement of their Consent Decree obligation for attorney fees and costs (Consent Decree, para. 9).

-B-

The filing of the Consent Decree in August 1978, however, did not end the work of the DVCCCA attorneys. They have been required to engage in extensive work arising out of Commonwealth requests for modifications of the Consent Decree; Commonwealth violations of the Consent Decree; and other Commonwealth motions and petitions which are delineated below:

1. Failure of Commonwealth to Comply with the Original Consent Decree.

The original Consent Decree required the Commonwealth to publish proposed I/M regulations by 7/1/79 (Sched. B, para. 2). When the Commonwealth failed to publish these regulations by 7/30/79 DVCCCA moved the Court to find the Commonwealth in contempt. The Court hearing on the motion took place on 9/20/79, by which time the Commonwealth had published (8/18/79) the proposed regulations. The Court refrained from declaring the Commonwealth in contempt but directed the parties to establish a revised time table for developing the I/M program.

DVCCCA counsel time involved:

Albert J. Slap, Esquire .....43 hours
James S. Lanard, Esquire .....29 hours
Eric Beller, Esquire .....6.9 hours

2. Revision of Original Consent Decree Time Table

At the Court hearing of 9/20/79 the Court directed the parties to establish a new time table. Accordingly the parties met on 10/1/79 and thereafter to prepare a new schedule and to review the Commonwealth's proposed regulations which had been published on 8/18/79. A new scheduled was worked out and the parties agreed on a number of revisions to the regulations. A new set of proposed regulations was then published on 10/27/79 and final regulations were published on 12/22/79.

DVCCCA Counsel time to develop a new schedule and to develop revised regulations was as follows:

Albert Slap, Esquire ..... 3.5 hours
James S. Lanard, Esquire .....37.5 hours

3. Commonwealth Request for First Modification

In the fall of 1979 the General Assembly of Pennsylvania considered a number of measures designed to frustrate the effectuation of the Consent Decree. One of these measures, House Bill 739, actually passed both houses of the General Assembly. Had it become law it would have created a crisis for the Executive Branch because it would have prohibited the Commonwealth from implementing I/M according to the schedule of the Consent Decree.

To avoid this crisis the parties agreed to modify the Consent Decree to as to delay the first phase of the I/M program to May 1, 1981 and the second phase until November 1, 1981. With this agreement the Governor was able to veto HB 739 and to prevent an override by the General Assembly.

The modification, in addition to extending the time for start-up of I/M, also made extensive changes in the substantive requirements. These changes were developed over a period of several months. The Court approved these modifications on March 7, 1980.

Jerome Balter, Esquire
..... 2.2 hours
.....63.0 hours

4. Commonwealth Request for Second Modification

In January 1981, less then 4 months before I/M was to be started, the Commonwealth informed DVCCCA that it was considering the possibility of specifying "computer analyzer" emission testing equipment for its I/M program but this would require a time extension of 20 months since "computer analyzer"

equipment had not, as yet, been manufactured even in prototype. In February 1981 the Commonwealth required DVCCCA to agree to a modification of the Consent Decree.

DVCCCA informed the Commonwealth that it was willing to consider the request but that such consideration would not relieve the Commonwealth of its obligation to comply with the May 1, 1981 deadline for I/M implementation required by the Consent Decree. Negotiations among the parties continued until April 28, 1981 when an impasse was reached and negotiations were ended.

Since that time there has been a plethora of activity in this Court:

* On April 29, 1981 the Commonwealth filed a motion to modify the Consent Decree, inter alia, to delay the start of the I/M program from 5/1/81 to 1/1/83.

* On April 30, 1981 the Commonwealth moved for a stay of the Consent Decree.

* On May 1, 1981 DVCCCA filed a motion, inter alia, to declare the Commonwealth in violation of the Consent Decree.

* On May 6, 1981 the Court convened a conference to hear the views

* On May 20, 1981 the Court, after receiving a requested report from the EPA on air quality in the regions affected by the Consent Decree, issued an order declaring the Commonwealth in violation of the Consent Decree and denying the Commonwealth's motion for a stay and denying the motion for a modification.

* On June 1, 1981 the Commonwealth moved for reconsideration of the Court Order of May 20.

* On June 1, 1981 the Commonwealth submitted its proposals for implementing I/M as soon as possible in response to the May 20 order.

* On June 8, 1981 DVCCCA filed its answer to the Commonwealth's request for reconsideration.

* On June 8, 1981 DVCCCA filed its comments to the Commonwealth's proposals for implementing I/M.

* On June 10, 1981 the Court held a hearing on the Commonwealth's motion for consideration and the Commonwealth's proposals for implementing I/M.

* On June 16, 1981 the Court issued an Order denying the request for reconsideration and establishing May 1, 1982 as the start-up for an I/M program. The Order included a number of provisions regarding consumer protection and minimum number of certified inspection stations which were based on proposals made by DVCCCA.

* On June 26, 1981 the Commonwealth filed a motion for reconsideration of the Court Order of June 16.

* On July 8, 1981 DVCCCA filed its answer in opposition to the request for reconsideration.

* On July 14, 1981 the Court denied the Commonwealth's request for reconsideration.

* On June 30, 1981 the Commonwealth filed a notice of appeal to the Circuit Court in respect to the Court Orders of May 20 and June 16.

* On July 30, 1981 the Commonwealth filed a motion to the District Court requesting a stay pending the outcome of its appeal to the Circuit Court.

* On August 10, 1981 DVCCCA filed its answer in opposition to the request for a stay. [The Court had not issued its Order in respect to the stay at the time this Petition was presented.]

DVCCCA counsel time involved up to and including August 20, 1981 was as follows:

Jerome Balter, Esquire
.....220.0 hours
James S. Lanard, Esquire
.....340.0 hours

II. ENTITLEMENT TO ATTORNEY FEES

This action was initiated on June 20, 1976 by the filing of a complaint, the jurisdiction being based on Section 304, Clean Air Act, 42 U.S.C. 7604; the Citizens' Lawsuit provision. Section 304(d), 42 U.S.C. 7604(d) provides for the payment of reasonable attorney fees in such cases in the following terms:

> "The Court in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney fees) to any party, whenever the court determines such award is appropriate."

In consideration of the foregoing statutory provision, the original Consent Decree, approved by the Court on August 29, 1978, included a requirement that the Commonwealth pay DVCCCA $30,000 for attorney fees and costs (Sched. B, para. 8); and requiring the EPA, originally named as a defendant, to pay attorney fees and costs (Sched. B, para. 9). Subsequent to the filing of the Consent Decree EPA agreed to pay DVCCCA $8,700 in settlement of their obligation.

The payments by the Commonwealth and EPA were based on work performed by DVCCCA counsel up to the time the Court approved the original Consent Decree; i.e. up until August 29, 1978.

As the history, supra, reveals the legal work required of DVCCCA did not end with the filing of the Consent Decree. Since that time DVCCCA counsel have spent considerable time (1) monitoring the Commonwealth's performance against the requirements of the Consent Decree; (2) negotiating Consent Decree modifications; (3) developing new time schedules necessitated by Commonwealth failures to meet Consent Decree schedules; (4) investigating technical aspects of Commonwealth proposals respecting I/M regulations; and (5) opposing Commonwealth motions which would delay the implementation of the Consent Decree and associated Court Orders.

The post Consent Decree legal work of DVCCCA attorneys, whether administrative in nature or directly involved in proceedings of record in the case, have been supportive of the Consent decree and necessary to achieve the results intended by the Consent Decree. All this work should be compensated under an attorney fee award because the work was "reasonably supportive" of the prior successful action that had resulted in the Court approved Consent Decree and the work was "reasonably necessary" to achieve the intent of the Decree. Hughes v. Repko, 578 F.2d 483, 487 (3rd Cir. 1978).

The post Consent Decree legal work has resulted in a number of significant Court Orders:

* The Modification of the original Consent Decree, approved by the Court on March 7, 1980.

* The Court Order of May 20, 1981 declaring the Commonwealth in violation of the Consent Decree.

* The Order of June 16, 1981 establishing May 1, 1982 as the date for implementing the newly designed I/M program including provisions for consumer protection and Commonwealth accountability.

Section 304(d), 42 U.S.C 7604(d), encompasses the awarding of attorney fees for post Consent Decree legal work, especially where, as here, it is directly related and necessary for the fullfillment of the Consent Decree.

III. CALCULATION OF THE ATTORNEY FEE

The Court of Appeal for the Third Circuit has developed a formula to determine an appropriate attorney fee

award. The formula requires (1) a determination of the number of hours reasonably necessary for the performance of the legal services; and (2) a determination of a reasonable hourly rate for each attorney. The product of these two figures establishes the base fee or "lodestar." The lodestar is then evaluated and may be adjusted by the Court in the light of the contingent nature of the case, the unusual quality of counsel's work, and the substantive purpose of the case. Lindy Brothers of Philadelphia v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3rd Cir. 1976) (en banc) (Lindy II); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3rd Cir. 1975); Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977) Prandini I); Prandini v. National Tea Co., 585 F.2d 47 (3rd Cir. 1978) (Prandini II); Hughes v. Repko,

supra, Baughman v. Wilson Freight Forwarding Co, 583 F.2d 1208 (3rd Cir. 1978).

The Court may also add to the "adjusted" lodestar the reasonable attorney fee for preparing the fee petition, Prandini II, supra; Bagby v. Beal, 606 F.2d 411 (3rd Cir. 1979).

Lastly, the Court may use its discretion to make a final adjustment to the attorney fees calculated under Lindy II, supra, and Prandini II, supra, "based on any rational factors that are relevant to the particular case," Hughes v. Repko, supra, at 492.

A. Hours Reasonably Necessary

The number of hours which each of DVCCCA's attorneys devoted to the different phases of the post Consent Decree work are listed in the attached affidavit.

The Public Interest Law Center of Philadelphia (PILCOP) has represented DVCCCA from the start of the action in June 1976 to the present time. A number of different attorneys have worked on the case over the more than 5 year period, but this Petition concerns only the post-Consent Decree time period; i.e., from August 1978 to date.

Section I(B), supra, of this Petition tabulates the total number of hours expended by each PILCOP attorney in respect to the four different phases of the work. This tabulation reveals that most of the hours were expended following the Commonwealth's request of April 29, 1981 for a delay of 20 months.

As the tabulations and supporting affidavits indicate, the

legal work was carried out by either one or two attorneys at any one time. Mr. Lanard has been involved in all four phases and provided the continuity to the work which avoided duplication. He was associated with Albert Slap in phase 1 and with Jerome Balter in phase 4. Phases 2 and 3 were conducted soley by Mr. Lanard with but an extremely small contribution by other attorneys.

The hours spent by each PILCOP attorney are based primarily upon contemporaneous time records kept by each attorney. Such records are acknowledged to be "the most accurate means for establishing the amount of time that a lawyer has devoted to a particular activity." Lindy Brothers Builders of Philadelphia v. American Radiator & Standard Sanitary Corp., 382

F.Supp. 999, 1011 (E.D. Pa. 1974) (on remand following Lindy I, supra); Meisel v. Kremens, 80 F.R.D. 419 (E.D. Pa. 1978). In those instances where time sheets were unavailable, the time and the nature of the work has been reconstructed by a thorough analysis of all documents maintained by the attorneys. Lindy II, supra, provides for such time reconstruction. Where time sheets had been lost or were unavailable or where any doubt existed, the attorneys used very conservative estimates.

A definite division of labor has been maintained among PILCOP attorneys throughout. Though at time two PILCOP attorneys may have been present at a negotiation, a conference or at a Court hearing, each was necessary for proper representation of DVCCCA

since complex issues were involved requiring the special knowledge accumulated by each attorney. While PILCOP never had more than 2 attorneys involved at any one time, the Commonwealth, in contract, often had 3 or more attorneys present at the same proceeding and they were often assisted by 3 or more specialists. Similarly, the EPA was often represented by 3 or more attorneys plus associated specialist.

The affidavits do not reflect the considerable time expended by PILCOP attorneys in connection with the Petitions for Intervention filed in this case* by two groups of Commonwealth leg-

*In re Petition of Zemperelli et al. filed 4/18/80

In re Petition of Belardi et al. filed 6/9/80

islators. PILCOP submitted extensive briefs in opposition to these petitions and is presently preparing another brief in opposition to the legislators' appeal of the Court Order* which denied the requests for intervention. Neither do the affidavits reflect the hours spent on keeping track of legislative events which could have an important bearing on this case.

The hours spent according to the contemporaneous or reconstruction time records of the individual attorneys were as follows:

Attorney	1979	1980	1981
Albert J. Slap	46.5		
Eric Beller	6.9		
James S. Lanard	122.0	7.5	340
Jerome Balter		2.2	220

*District Court Order of March 15, 1981.

B. Reasonable Hourly Rates

"The value of an Attorney's time generally is reflected in his normal billing rate," Lindy I, supra, 487 F.2d at 167; but "legal services attorney and other public interest lawyers do not have normal billing rates because they have no market for their skills." Rodriguez v. Taylor, 569 F.2d 1231, 1250 (3rd Cir. 1977), cert. den. 436 U.S. 913 (1978). Rodriguez established that reasonable rates for attorneys employed by non-profit law firms such as PILCOP should not be lower than similarly experienced colleagues in commercial practice. Id. at 1250. See also Vecchione v. Wohlgemuth, 481 F.Supp. 776 (E.D. Pa. 1979).

The rate set forth infra are based on historical principles, i.e. rates which would have been earned in the year work was performed, rather than current rates, for persons of the same experience level. Information as to the qualifications of the attorneys is presented in the affidavits submitted herewith. The hourly rate requested for each attorney for each particular year are as follows:

Attorney	1979	1980	1981
Albert J. Slap	$85		
Eric Beller	50		
James S. Lanard	50	$65	$85
Jerome Balter		85	100

The hourly rates set forth in the table are based on an investigation of normal billing rates charged by attorneys with comparable ability and experience in the Philadelphia area.

These hourly rates are in line with a survey of fees charged by major law firms in the Philadelphia area conducted in 1978 by the Community Legal Services, Inc. That survey showed that rates in 1978 varied from $45 for first year attorneys to $150 for senior partners. The rates indicated in the table reflect increases in hourly rates that have occurred in the years since 1978.

C. The Lodestar Calculation

The lodestar amounts which counsel seek are based on the number of hours of each attorney for each year and the corresponding hourly rate for the year:

Albert J. Slap

1979	46.5 hrs.	at $85	=$ 3,925.50

Eric Beller

1979	6.9 hrs.	at $50	=$ 345.00

James S. Lanard

1979	122.0 hrs.	at $50	= 6,100.00
1980	7.5 hrs.	at $65	= 487.50
1981	340.0 hrs.	at $85	=$28,900.00

Jerome Balter

1980	2.2 hrs.	at $85	= 187.00
1981	220.0 hrs.	at $100	=$22,000.00

Total Lodestar Figure $61,944.50

D. The Lodestar Multiplier

The Circuit Court decision in Lindy I, supra; Lindy II, supra, and Hughes v. Repko, supra list factors such as contingency, unusual quality, and substantive purpose which should be considered by the Court in determining whether the lodestar figure should be adjusted by a multiplier.

1. Contingency

The post Consent Decree legal work of DVCCCA counsel described in Sections I(B)(1), (2) and (3), though involving some matter of records, could be categorized as administrative inasmuch as they primarily involved modifications, rescheduling and Consent Decree compliance monitoring. No contingency aspect was involved in this work.

Section I(B)(4), which relates to the Commonwealth request for a 20 month delay did, however, involve risk on the part of DVCCCA. The Commonwealth's request for a delay of 20 months, it will be recalled, was supported by the EPA, the other plaintiff in the consolidated action. DVCCCA and to the interests of the 6,000,000 people

living in the area affected by the Consent Decree. If DVCCCA had not prevailed it is a matter of speculation as to whether the Court would have awarded attorney fees for the hours spent on this phase of the work.

As the Court is aware, DVCCCA's position was accepted by the Court and the Court should, therefore, give DVCCCA positive consideration in determining whether a multiplier should be applied to the lodestar based on this contingency.

2. Quality

No adjustment in the lodestar is requested for the quality of the work. It should be noted, however, that the quality of DVCCCA counsel work should be gauged by the fact that they

have prevailed against the concerted efforts of some of the leading attorneys of the Commonwealth.

3. Substantive Purpose

This action involves the quality of the air which 6,000,000 people breathe. These are the people who live in the 10 counties affected by the Consent Decree. The air which these people breathe does not meet federal air quality standards. It was the explicit purpose of the Congress:

> "[T]o protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."

Section 101(b)(1), Clean Air Act, 42 U.S.C. 7401(b)(1). This national purpose echoes Pennsylvania's own Constitutional declaration that:

> "The people have a right to clean air, pure water, and to the preservation of' the natural, scenic, historic and esthetic values of the environment. .... As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."

Pennsylvania Constitution, Article #1, §27.

To fulfill the national purpose the Commonwealth was required to implement an I/M program by May 1, 1975, 40 CFR 52.2038(d). This I/M program was required in order to reduce carbon monoxide and ozone pollution to a level in keeping with federal air quality standards, and thereby to promote the health and welfare of the people.

DVCCCA has consistently worked to achieve the purposes of the Clean Air Act, both before the filing of the Consent Decree and thereafter.

As the Court well knows, the Commonwealth is presently seeking to have the I/M requirement eliminated through Congressional action or by other means. To accomplish this goal the Commonwealth has recently unleashed a barrage of legal motions, petitions and appeals seeking, through the courts, to win time. DVCCCA stands along in oppossing those tactics.

DVCCCA counsel not only seek to have the I/M program implemented as soon as possible. They are equally concerned about providing vehicle owners with as

much consumer protection as possible. With this in mind DVCCCA suggested the Court explicitly require monthly on-site state audits of every inspection station and also require independent referee stations. These suggestions were incorporated in the Court Order of June 16, 1981.

Thus DVCCCA has been the principle party seeking to protect he health and the pocketbook for millions of people.

DVCCCA's citizen lawsuit to enforce the I/M requirement is unique. DVCCCA has not been able to find any other case where citizens have brought an action of this type.

Based on the foregoing consideration DVCCCA respectfully suggests that the Court apply a multiplier of

1.5 to the lodestar. Should the Court agree with this proposal the award for attorney fees would equal $92,916.75.

E. Compensation for Time Spent Preparing Fee Petition

It is well established that counsel are entitled to compensation for time spent in preparing the Petition for attorney fees. Bagby. v. Beal, 606 F.2d 411 (3rd Cir. 1979), Prandini v. National Tea Company, 585 F.2d 47 (3rd Cir. 1978). The hours expended in preparing this fee petition and the associated hourly rates are as follows:

Jerome Balter

30.5 hrs. at $100 = $3,050.00

James S. Lanard

3.0 hrs. at $ 85 = 255.00

Total Attorney Fee for Preparing Petition $3,315.00

IV. CONCLUSION

Wherefore, Petitioners request an award of a counsel fee to the Public Interest Law Center of Philadelphia in the amount of $92,916.75, and an additional award of a counsel fee for the preparation of this fee petition in the amount of $3,315.00 to be paid by the defendants, Commonwealth of Pennsylvania, et al.

THE PUBLIC INTEREST LAW
OF PHILADELPHIA

By /s/
Jerome Balter, Esquire

By /s/
James S. Lanard, Esquire

Attorney for Plaintiffs, et al.

* * * * *

(Affidavit of Jerome Balter with Attachments A, B, C and D and Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al., Plaintiffs	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	NO. 76-2068
UNITED STATES OF AMERICA, Plaintiff	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	NO. 77-619

DELAWARE VALLEY CITIZENS' FOR CLEAN AIR, PLAINTIFFS, PETITION FOR ATTORNEY FEES AND COSTS

Request to Reinstate Fee Petition

On August 21, 1981, Delaware Valley Citizens' Council for Clean Air, et al. DVCCCA) petitioned this Court for an award of reasonable attorney fees to

be assessed against the Commonwealth defendants. Such an award is within the discretion of the Court under the citizen lawsuit provision of the Clean Air Act, 42 U.S.C. §7604(d).

The August 21, 1981 fee petition had been filed after the Court had (1) found the defendants in violation of the Consent Decree (Court Order of 5/20/81); (2) established May 1, 1982 as the new scheduled date for I/M program implementation (Court Order of 6/16/81); denied the defendants a rehearing (Court Order of 7/14/81); and denied defendants' Motion for a Stay (Court Order of 8/20/81).

Because the defendants had filed notices of appeal in respect to the Court Orders of 5/20/81 and 6/16/81, the Court, on September 24, 1981, denied the DVCCCA fee petition, but the denial

was with "leave to reinstate the Motion upon further Court approval."

Since September 24, 1981, there has been a considerable amount of litigation and a considerable amount of associated activity in the Pennsylvania General Assembly. All these activities reached a culmination when the General Assembly, on May 4, 1983, enacted Act 1983-3 which authorized the defendant Secretary of Transportation of Pennsylvania to implement the motor vehicle emission inspection and maintenance (I/M) program as required by the consent decree. This enactment purged the defendants' civil contempt and resulted in the Court vacating the contempt sanction which had been imposed by the Court Order of 1/22/82. (Court Orders of 5/6/83 and 5/16/83.) The Court Order of 5/16/83, which vacated the final remnants of the contempt sanction

followed an agreement among the parties on a new schedule of compliance under which the Commonwealth is obligated to implement the I/M program by June 1, 1984 and is tantamount to a final order.

The resolution of the outstanding differences among the parties, and the stated resolve of the Commonwealth defendants to proceed with dispatch to fulfill their I/M consent decree obligations, indicates that this is the proper time for DVCCCA to request leave of the Court to reinstate and to update its petition for attorney fees and costs.

Accordingly, DVCCCA hereby requests leave to reinstate and update its petition. In support of this petition, DVCCCA respectfully submits, for the Court's consideration, the following.

I. HISTORY OF THE CASE

A. Aspects of Lawsuit Not covered By This Petition

On November 28, 1973, the Administrator of the United States Environmental Protection Agency (EPA) promulgated a portion of the Pennsylvania State Implementation Plan (S.I.P.), 38 Fed.Reg. 32893 (11/28/73), which required the Commonwealth of Pennsylvania to implement a motor vehicle emission inspection and maintenance (I/M) program by May 1, 1975, 40 C.F.R. 52.2038(d)(6), in the Philadelphia and Pittsburgh metropolitan regions.

When the Commonwealth failed to implement the I/M program, the Delaware Valley Citizens' Council for Clean Air, et al. (DVCCCA) commenced this action

by filing a complaint under the citizens' lawsuit provision of the Clean Air Act, 42 U.S.C. §7604, against the Commonwealth. The Administrator of the EPA was also named as a defendant for his failure to enforce the I/M program requirement of the S.I.P. When EPA decided to bring its own, consolidated, enforcement action against the Commonwealth, the EPA was dismissed as a defendant.

Negotiations among the parties produced the Consent Decree of August 29, 1978, which obligated the Commonwealth to commence the I/M program by August 1, 1980.

As part of the Consent Decree, the Commonwealth paid DVCCCA $30,000 for attorney fees and costs (Consent Decree, para. 8) and EPA paid DVCCCA $8,700 for attorney fees and costs (Consent Decree, para. 9).

B. Phases of Lawsuit Covered By This Petition

The filing of the August 29, 1978 Consent Decree, unfortunately, did not resolve the case. Since then, DVCCCA has been involved in continuous litigation to compet Commonwealth compliance with its Consent Decree obligations. All of this litigation has resulted for the actions of the Commonwealth in seeking decree modifications, in appealing District Court and Circuit Court rulings, in violating Consent Decree obligations, and in contumacious conduct. DVCCCA's legal work since the filing of the original Consent Decree is delineated below:

Phase 1. Failure of Commonwealth to Comply with Consent Decree Of August 29, 1978

Under the Consent Decree, the Commonwealth was required to publish certain proposed regulations by July 1, 1979 (Schedule B, para. 2). When the Commonwealth failed to publish these regulation by July 30, 1979, DVCCCA moved to find the defendants in violation. The Court hearing on the motion occurred on September 20, 1979, by which time defendants had published (8/18/79) the necessary regulations so the Court directed the parties to establish a revised I/M program schedule.

Attorney Time for:

PHASE 1

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
29.0					29.0

Attorney: Albert Slap

1979	1980	1981	1982	1983	Total Hours
37.0					37.0

Attorney: Eric Beller

1979	1980	1981	1982	1983	Total Hours
6.9					6.9

72.9

Phase 2. Revisions of Original Consent Decree Schedules

Following the instructions of the Court at the hearing on September 20, 1979, the parties worked out a new schedule and agreed to a revision of some of PennDOT's I/M program regulations. These new regulations were published by PennDOT in final form on December 22, 1979 in the Pennsylvania Bulletin.

Attorney Time for:

PHASE 2

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
37.5					37.5

Attorney: Albert Slap

1979	1980	1981	1982	1983	Total Hours
3.5					3.5
					41.0

Phase 3. Commonwealth Request for First Modification

In the autumn of 1979, the Pennsylvania General Assembly took under consideration a number of bills designed to frustrate the implementation of the Consent Decree. House Bill 739, designed to prohibit the I/M program in

Pennsylvania, actually passed both houses of the Assembly, but was vetoed by the Governor. To help defeat the effort to override the veto, the parties modified the Consent Decree so as to delay I/M program commencement from August 1980 until May 1, 1981. The Consent Decree modification, approved by the Court on March 7, 1980, not only rescheduled the I/M program, but also included revisions to some of the substantive aspects of the decree.

Attorney Time for:

PHASE 3

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
2.20					2.20

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
54.25	7.50				61.75

63.95

Phase 4. Commonwealth Violation of the First Modification of the Consent Decree

In February 1981, just three months before the I/M Program was scheduled for implementation, the Commonwealth requested DVCCCA's approval of a proposal to alter the specifications for the emission analyzer equipment and to extend the date of implementation some 20 months; i.e., until January 1, 1983, because the analyzer preferred by the Commonwealth had not, as yet, been produced even in prototype.

DVCCCA informed the defendants that it was willing to consider the request, but that such consideration would not relieve them of their obligation to comply with the May 1, 1981 schedule of the existing decree. Extended negotiations took Place but the

parties reached an impasse on April 28, 1981. Thereafter, a plethora of Court activity followed:

* April 29, 1981: The Commonwealth filed a motion to modify the Consent Decree, inter alia, to delay the start of the I/M program from May 1, 1981 to January 1, 1983.

* April 30, 1981: The Commonwealth moved for a stay of the Consent Decree.

* May 1, 1981: DVCCCA filed a motion, inter alia, to declare the Commonwealth in violation of the Consent Decree.

* May 6, 1981: The Court convened a conference to hear the views of the parties on the foregoing motions.

* May 20, 1981: The Court, after receiving a requested report from the EPA on air quality in the regions affected by the Consent Decree, issued an order declaring the Commonwealth in violation of the Consent Decree and denying the Commonwealth's motion for a stay and denying the motion for a modification.

* June 1, 1981: The Commonwealth moved for reconsideration of the Court Order of May 20.

* June 1, 1981: The Commonwealth submitted its proposals for implementing I/M as soon as possible in response to the May 20 Order.

* June 8, 1981: DVCCCA filed its answer to the Commonwealth's request for reconsideration.

* June 8, 1981: DVCCCA filed its comments to the Commonwealth's proposals for implementing I/M.

* June 10, 1981: The Court held a hearing on the Commonwealth's motion for reconsideration and the Commonwealth's proposals for implementing I/M.

* June 16, 19S1: The Court issued an Order denying the request for reconsideration and establishing May 1, 1982 as the start-up date for an I/M program. The Order included a number of provisions regarding consumer protection and minimum number of certified inspection stations which were based on proposals made by DVCCCA.

* June 26, 1981: The Commonwealth filed a motion for reconsideration of the Court Order of June 16, 1981.

* July 8, 1981: DVCCCA filed its answer in opposition to the request for reconsideration.

* July 14, 1981: The Court denied the Commonwealth's request for reconsideration.

* July 30, 1981: The Commonwealth filed a notice of appeal to the Circuit Court in respect to the Court Orders of May 20 and June 16.

* July 30, 1981: The Commonwealth filed a motion to the District Court requesting a stay pending the outcome of its appeal to the Circuit Court.

* August 10, 1981: DVCCCA filed its answer in opposition to the Commonwealth's request for a stay.

* August 20, 1981: The District Court denied defendants' motion for stay pending appeal.

* August 7, 1981: Commonwealth filed notice of appeal in re District Court Orders of May 20, 1981 and June 16, 1981. Circuit Court Docket No. 81-2303.

* August 27, 1981: Commonwealth filed motion for stay of District Court Order of June 16, 1981.

* September 4, 1981: DVCCCA filed response in opposition to Commonwealth's request for stay.

* September 11, 1981: Commonwealth motion for expedited hearing.

* September 14, 1981: Circuit Court denied motion for stay.

* September 18, 1981: Circuit Court denied motion for expedited hearing.

* October 9, 1981: DVCCCA filed brief in opposition to Commonwealth's appeal brief, No. 81-2303.

* February 2, 1982: Circuit Court hearing on Commonwealth appeal.

* March 1, 1982: Circuit Court affirms District Court Order of May 20, 1981 and Order of June 16, 1981. DVCCCA v. Commonwealth, 674 F.2d 976 (3d Cir., 3/1/82).

* March 12, 1982: Commonwealth Petition for Rehearing en banc.

* March 26, 1982: Circuit Court denied Petition for Rehearing.

* June 22, 1982: Commonwealth Petition to United States Supreme Court for Writ of Certiorari from 674 F.2d 976, supra. Supreme Court Docket No. 81-2331.

* July 22, 1982: DVCCCA filed brief in opposition to petition for certiorari.

* October 12, 1982: United States Supreme Court denied Petition for Certiorari. DVCCCA v. Commonwealth, 103 S.Ct. 206 (1982).

Attorney Time for:

PHASE 4

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
		292.30	44.2		337.10

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
		394.25	4.5		398.75

Attorney: Michael Churchill

1979	1980	1981	1982	1983	Total Hours
		1.60	6.5		8.10

Attorney: Thomas Gilhood

1979	1980	1981	1982	1983	Total Hours
			3.0		3.0

746.95

Phase 5. Commonwealth Legislature Prohibits Compliance with Consent Decree

Following the District Courts Order of June 16, 1981, the defendant Pennsylvania Secretary of Transportation had undertaken the necessary steps to comply with that Order when the Pennsylvania General Assembly, over the veto of Governor Thornburgh, enacted House Bill No. 456 §2, Act #99 (10/5/81), which prohibited the PennDOT Secretary from expending any funds on the I/M program. This legislative enactment caused DVCCCA to move for a contempt citation and produced the following litigation:

* October 12, 1981: Commonwealth moves for stay of consent decree and for modification of consent decree as a result of H.B. 456 §2.

* October 19, 1981: DVCCCA moves to declare defendants in civil contempt and to establish sanctions.

* October 29, 1981: DVCCCA brief in opposition to Commonwealth's motion for modification.

* November 6, 1981: DVCCCA Memorandum in re United States memorandum.

* November 20, 1981: Court hearing on DVCCCA contempt motion.

* December 12, 1981: DVCCCA submits brief to District Court concerning applicability of Contract Clause of the United States Constitution.

* December 30, 1981: United States submits report to Court on status of I/M program.

* January 5, 1982: DVCCCA comments on United States' report.

* January 22, 1982: District Court declares defendants to be in civil contempt and imposes civil contempt sanctions. DVCCCA v. Commonwealth, 533 F.Supp. 869 (E.D. Pa., 1/22/82).

* February 9, 1982: Commonwealth moves for stay of January 22, 1982 Order.

* February 22, 1982: DVCCCA memorandum in opposition to stay request.

* February 18, 1982: Court denies Commonwealth request for stay.

* February 5, 1982: Commonwealth notice of appeal to Third Circuit Court of District Court Order of January 22, 1982. Case docketed at No. 82-1104.

* March 8, 1982: Commonwealth motion for stay of January 22, 1982 contempt order.

* March 16, 1982: DVCCCA brief in opposition to motion for stay.

* March 19, 1982: Circuit Court hearing on motion for stay.

* March 19, 1982: Circuit Court grants stay of contempt sanction (divided Court).

* March 23, 1982: DVCCCA petition for rehearing en banc.

* April 6, 1982: Circuit Court denies DVCCCA petition for rehearing.

* April 13, 1982: DVCCCA brief in opposition to Commonwealth's appeal.

* May 13, 1982: Circuit Court oral arguments on Commonwealth's appeal of District Court Order of January 22, 1982.

* May 21, 1982: Circuit Court affirms District Court Order of January 22, 1982. DVCCCA v. Commonwealth, 678 F.2d 470 (3d Cir., 5/21/82).

* June 7, 1982: Commonwealth Motion for Stay of Circuit Court ruling.

* June 14, 1982: DVCCCA memorandum in Opposition to motion for stay.

* June 23, 1982: Circuit Court denies motion for stay.

* June 27, 1982: Commonwealth application to United States Supreme Court for Stay. Case docketed at No. A-103.

* July 29, 1982: DVCCCA memorandum to United States Supreme Court in opposition to motion for stay.

* July 30, 1982: Mr. Justice Brennan denies motion for stay.

* August 6, 1982: Commonwealth application for stay to Mr. Justice Rehnquist.

* August 6, 1982: DVCCCA memorandum in opposition to request for stay.

* September 9, 1982: United States Supreme Court denies application for stay.

* August 17, 1982: Commonwealth petition for writ of certiorari filed with Supreme Court; docketed at No. 82-274.

* October 7, 1982: DVCCCA files brief in opposition to Commonwealth's petition for certiorari.

* November 1, 1982: United States Supreme Court denies writ of certiorari. DVCCCA v. Commonwealth, 103 S.Ct. 14 (1982).

Attorney Time for:

PHASE 5

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
		145.1	297.80	23.0	465.90

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
		99.5	6.00		105.50

Attorney: Michael Churchill

1979	1980	1981	1982	1983	Total Hours
		5.7	29.55		35.25

Attorney: Thomas Gilhool

1979	1980	1981	1982	1983	Total Hours
			13.60		13.60

620.25

Phase 6. Petitions to Intervene in Action

Following the filing of Consent Decree and Court Orders in this action, a number of attempts were made by various individuals to intervene in the action. All of these attempts were for the purpose of defeating or frustrating the Consent Decree. It was therefore incumbent on DVCCCA to oppose these attempts:

* March 27, 1981: District Court denies petitions to intervene of Zemprelli, et al., and Belardi, et al. to intervene.

* August 27, 1981: DVCCCA files brief in opposition to Zemprelli/Belardi appeals in the Circuit Court.

* March 1, 1981: Circuit Court affirms District Court Order of March 27, 1981. DVCCCA v. Commonwealth, 674 F.2d 970 (3d Cir. 1982).

* December 22, 1982: City of Pittsburgh petition to intervene denied by District Court.

* January 7, 1983: Joseph A. Hopper petition to intervene denied by District Court.

* April 8, 1983: DVCCCA brief in opposition to City of Pittsburgh appeal to the Circuit Court. Docketed at No 83-1032.

* May 24, 1983: DVCCCA submitts motion to dismiss appeal on ground of mootness.

Attorney Time for:

PHASE 6

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
				17.5	17.5

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
		35.5	9.50		45.0

62.5

Phase 7. Administration of Civil Contempt Sanction

The District Court's civil contempt sanction imposed on January 22, 1982 enjoined the United States Secretary of Transportation from approving certain federal-aid highway grants under Title 23, United States Code, "other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance...", DVCCCA v. Commonwealth, 533 F.Supp. 869 (E.D. Pa. 1982). Because the defendants were seeking to stay this injunction and to find ways to narrow the scope and effect of the injunction, DVCCCA found it necessary to monitor the effectiveness of the injunction and to oppose attempts by the defendants to obtain exemptions from the January 22, 1982 Court Order:

* March 1, 1982: DVCCCA interrogatories re federal-aid highway funds to Commonwealth (First Set).

* March 18, 1982: Commonwealth, Department of Environmental Resources' response to DVCCCA interrogatories of March 1, 1982.

* March 31, 1982: Commonwealth, Pennsylvania Department of Transportation's response to DVCCCA interrogatories of March 1, 1982.

* April 8, 1982: DVCCCA interrogatories directed to United States (First Set):

* April 8, 1982: DVCCCA interrogatories directed to Commonwealth (Second Set).

* July 26, 1982: DVCCCA interrogatories directed to Commonwealth (Third Set).

* July 26, 1982: DVCCCA interrogatories directed to United States (Second Set).

* August 13, 1982: Commonwealth, Department of Environmental Resources' answers to Third Set of Interrogatories.

* August 27, 1982: Commonwealth, Pennsylvania Department of Transportation's answers to Third Set of Interrogatories.

* August 30, 1982: United States' answers to Second Set of Interrogatories.

On October 6, 1982, the Commonwealth requested the Court to approve seven highway projects as exceptions to the civil contempt sanction. The United States Secretary of Transportation had certified these projects as exceptions under the Court Order of January 22, 1982. The motion of the Commonwealth led to the following:

* October 6, 1982: Commonwealth motion for approval of seven highway projects as exceptions to civil contempt sanction.

* October 14, 1982: DVCCCA motion for expedited discovery.

* October 21-22, 1982: Depositions of Designee of the United States Secretary of Transportation and employees of the Pennsylvania Department of Transportation in re the seven projects certified as exceptions to the Court.

* November 1, 1982: DVCCCA memorandum to the Court in re the seven highway projects.

* November 4, 1982: Oral arguments and presentations in re the seven projects.

* November 9, 1982: Court order denying approval of five projects and granting approval of two projects, as record ended by DVCCCA.

* January 6, 1983: Commonwealth Notice of Appeal from District Court Order of November 9, 1982. Docketed at No. 83-1025.

* March 16, 1983: Commonwealth Brief to Circuit Court.

* April 14, 1983: DVCCCA Brief in Opposition to Appeal (appeal pending).

* February 2, 1983: Second Certification of Projects as exceptions to sanction.

* February 10, 1983: DVCCCA comments to Court re Second Certification.

* May 24, 1983: DVCCCA submits motion to dismiss appeal on ground of mootness.

Attorney Time for:

PHASE 7

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
			88.30		88.30

Attorney: Michael Churchill

1979	1980	1981	1982	1983	Total Hours
			8.15		8.15

Attorney: Thomas Gilhool

1979	1980	1981	1982	1983	Total Hours
			6.80		6.80

103.25

Phase 8. Legislative Authorization of I/M Program

On May 3, 1983, both Houses of the Pennsylvania General Assembly approved Act 1983-3, which authorized the defendant Pennsylvania Secretary of Transportation to proceed with the implementation of the I/M program required by the Consent Decree. The following day, May 4, Governor Dick Thornburgh signed Act 1983-3 into law. Immediately thereafter, DVCCCA made arrangements with the Environmental Protection Agency and with PennDOT for conferences designed to expedite proceedings which did lead to successful negotiation of a new compliance schedule, the establishment of June 1, 1984 as the date for commencement of the I/M Program, and the agreement to completely vacate the sanction:

* May 4, 1983: Governor Dick Thornburgh signs Act 1983-3 into law authorizing PennDOT to proceed with an I/M program.

* May 5, 1983: DVCCCA meets with EPA-Region III to coordinate response to Act 1983-3 provisions.

* May 12, 1983: DVCCCA meets with PennDOT and EPA to negotiate new compliance schedule and provisions.

* May 16, 1983: DVCCCA submits response to Commonwealth motion to vacate contempt.

* May 16, 1983: Court hearing on motion to vacate contempt sanction. DVCCCA supports motion to vacate.

* May 16, 1983: Court orders contempt sanction vacated.

Attorney Time for:

PHASE 8

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
				43.5	43.5

Phase 9. Associated Activity in State Court and in Environmental Protection Agency Regulatory Agency

(a) State Court Litigation

A number of members of the Pennsylvania General Assembly, some of whom had attempted to intervene in the federal court action, challenged the executive branch's construction of the Pennsylvania Vehicle Act, 75 Pa.C.S. 101 et seq., in respect to legislative authorization of the I/M program. DVCCCA tracked this litigation and submitted an amicus brief in respect to Scanlon v. Pennsylvania Department of Transportation, Commonwealth Court Docket No. 2472 C.D. 1981. In Burd v. Pennsylvania Department of Transportation, 443 A.2d 1197 (Pa. Cmwlth Ct., 8/9/81), a divided Commonwealth Court

held that the Pennsylvania Vehicle Act did authorize the executive branch to implement an I/M program.

Attorney Time for:

PHASE 9(a)

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
		11.4	6.8		18.2

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
		5.0			5.0

Attorney: Michael Churchill

1979	1980	1981	1982	1983	Total Hours
		.4			.4

23.6

(b) PA Regulatory Activity

During the course of this litigation, the Commonwealth requested the EPA to modify the Pennsylvania State Implementation Plan (SIP) in respect to the geographical areas to be encompassed by the I/M program in both the greater Philadelphia I/M region and the greater Pittsburgh I/M region. Since EPA decisions on these Commonwealth requests would affect this lit.ignation, DVCCCA participated in the Public hearings and submitted comments on the matter to the EPA. EPA's determination accepted the Commonwealth's proposal to reduce the geographical area encompassed by the Pittsburgh I/M region and these changes were incorporated into Act 1983-3 by the General Assembly on May 4, 1983. The EPA, however, rejected the request to reduce the Philadelphia I/M region and

that region remains as it has been throughout the litigation.

DVCCCA also participated in EPA hearings concerning possible administrative sanctions relative to cut-offs of Clean Air Act grants to the Commonwealth and possible prohibition of certain tyPes of stationary pollution sources because of the Commonwealth's failures to comply with the Clean Air Act requirements in connection with the SIP revision of July 1, 1982, under Section 172, 42 U.S.C. §7502. Since these administrative hearings were closely related to the I/M litigation and the EPA determinations could have a bearing on the litigation, DVCCCA participated in the hearings and submitted comments to the EPA. To date, the EPA has not announced its decision.

Attorney Time for:

PHASE 9(b)

Attorney: Jerome Balter

1979	1980	1981	1982	1983	Total Hours
		2.8	28.5	1.8	33.1

Attorney: James Lanard

1979	1980	1981	1982	1983	Total Hours
			4.0		4.0

37.1

II. ENTITLEMENT TO ATTORNEY FEES

This action was commenced under the citizen lawsuit provision of the Clean Air Act, 42 U.S.C. § 7604, which authorizes the award of reasonable attorney fees and costs at the discretion of the Court:

> "The Court, in issuing any final order in any action brought pursuant to sub-section (2) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines.such award is appropriate..."

42 U.S.C. §7604(d). In consideration of this provision, the original consent decree (August 29, 1978), approved by the Court, included a requirement that the Commonwealth pay DVCCCA $30,000 in respect to attorney fees and costs (Consent Decree, para. 8) and provided for EPA, originally named as a defendant, to also pay DVCCCA attorney fees and costs (of $8,700) (Consent Decree, para. 9).

These payments for attorney fees and costs covered the period from the commencement of the action to the approval of the Consent Decree on August 29, 1978. None of the costs or attorney fees since August 29, 1978 have been reimbursed by the Commonwealth.

The foregoing History demonstrates that the litigation subsequent to the filing of the Consent Decree has been quite extensive. All of this post-Consent Decree work was necessitated either by the failure of the Commonwealth to comply with its Consent Decree obligations or by the requests of the Commonwealth to modify the Consent Decree. The work of the DVCCCA attorneys throughout the post-Decree period has been to vindicate the public's rights under the Consent Decree and under the Clean Air Act. Since this post-Consent Decree legal work was supportive of the Consent Decree and was necessary to achieve the intent of the Decree, it should be compensated under the attorney fee award provision. Hughes v. Repko, 578 F.2d 483, 487 (3d Cir. 1978).

The post-Consent Decree legal work has resulted in a number of significant Court decisions:

* May 20, 1981: District Court Order declaring Commonwealth to be in violation of Consent Decree.

* June 16, 1981: District Court Order construing provisions oi' the Consent Decree.

* January 22, 1982: District Court Order declaring Commonwealth in civil contempt and imposing civil contempt sanctions. DVCCCA v. Commonwealth, 533 F.Supp. 869 (E.D. Pa. 1982).

* March 1, 1982: Circuit Court affirms District Court Orders of May 20 and June 16, 1981. DVCCCA v. Commonwealth, 674 F.2d 976 (3d Cir. 1982).

* May 21, 1982: Circuit Court affirms District Court Order of January 22, 1982. DVCCCA v. Commonwealth, 678 F.2d 470 (3d Cir. 1982).

* September 9, 1982: United States Supreme Court denies stay of District Court Order of January 22, 1982. Supreme Court Docket No. A-103.

* October 12, 1982: United States Supreme Court denies a writ of certiorari in respect to 674 F.2d 976. DVCCCA v. Commonwealth, 103 S.Ct. 206 (1982).

* November 1, 1982: United States Supreme Court denies a writ of certiorari in respect to 678 F.2d 470. DVCCCA v. Commonwealth, 103 S.Ct. 14 (1982).

* November 9, 1982: District Court Order approving two highway projects and disapproving five highway projects as exceptions to contempt sanction. DVCCCA v. Commonwealth, 551 F.Supp. 827 (E.D. Pa. 1982).

All of these Court decisions were essential to the jurisdication of the Consent Decree. Accordingly, the legal work performed to achieve these decisions and the ancillary legal work are compensable under the attorney fee provision of 42 U.S.C. §7604(d).

III. CALCULATION OF THE ATTORNEY FEE

The Court of Appeals for the Third Circuit has evolved a formula for calculating the appropriate attorney fee award in cases where the Court in its discretion, and based on sound legal authority, determines that an award of attorney fees should be made. This formula requires the Court to determine the number of hours reasonably necessary for the performance of the legal tasks performed and a determination of the reasonable hourly rates to be paid for the attorney who rendered the service. The product of the reasonable number of hours and the reasonable hourly rates establish the "lodestar" amount of the attorney fee. The Court may adjust this lodestar figure based upon the substantive purpose of the case, the quality

of counsel's work and the contingent nature of the case. Lindy Brothers of Philadelphia v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (en banc) (Lindy. II); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975); Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) (Prandini I); Prandini v. National Tea Co., 585 F.2d 47 (3d Cir. 1978) (Prandini II); Hughes v. Repko, supra; Bauohman v. Wilson Freight Forwarding Co., 583 F.2d 1208 (3d Cir. 1978).

The Court may also add to the adjusted lodestar a reasonable attorney fee for preparing the fee petition, Prandini II, supra; Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979).

Lastly, the Court may use its discretion to make a final adjustment to the attorney fees calculated under Lindy II, supra, and Prandini II, supra, "based on any rational factors that are relevant to the particular case", Hughes v. Repko, supra, at 492.

A. Attorney Hours Reasonably Necessary

The Public Interest Law Center of Philadelphia (PILCOP), a non-profit tax exempt legal corporation, has represented the private plaintiffs, DVCCCA, from the very inception of this case in June 1976. As noted, supra, the Commonwealth and the United States, a defendant in the original complaint, both paid attorney fees to PILCOP under the terms of the 1978 Consent Decree covering legal work up to and including the filing of the Consent Decree in August 1978.

During the almost five years which have transpired since the parties concluded the Consent Decree, six individual attorneys have represented the DVCCCA plaintiffs, but the major burden has been carried by just two attorneys, Jerome Balter and James S. Lanard.

The time which each attorney devoted to this case, on a daily basis, is listed in the attached affidavit of Jerome Balter which also indicates the particular phase of the case which that attorney was working on. A summary of these time records, for each attorney, is provided in Tables 1 through 6 below. The Phase Numbers in these Tables correspond to the phases of the legal work described in Section I(B).

The time expended by each attorney for each phase of the work is based primarily and preponderantly on contemporaneous time records maintained by the individual attorneys. Such records are recognized to be "the most accurate means for establishing the amount of time that a lawyer has devoted to a particular activity", Lindy Brothers Builders of Philadelphia v. American Radiator & Standard Sanitary Corp., 382 F.Supp. 999, 1011 (E.D. Pa. 1974) [on remand from Lindy. I, 487 F.2d 161 (3d Cir. 1973)]; Miesel v. Kremens, 80 F.R.D. 419 (E.D. Pa. 1978). Where daily time sheets are not available, the nature of the work and the time expended on the work has been reconstructed by a thorough analysis of all documents maintained by the attorneys. Such means for

authenticating legal work time is permitted under Lindy II, 540 F.2d 102 (3d Cir. 1976) (en banc). In those few situations, where daily time sheets were not available, the reconstructed time has been conservatively estimated.

Throughout all phases of the legal work, a definite division of labor was maintained among PILCOP attorneys and duplication of effort was avoided to the maximum extent. As the daily time sheets reveal, there were rarely more than two PILCOP attorneys actively working on the case at the same time, and then only on a very limited basis. When more than one PILCOP attorney appeared at a court hearing or at a negotiation, each was required for a proper representation of DVCCCA's position on complex legal or factual issues, where special knowledge acquired

by individual attorneys was needed. While DVCCCA was rarely represented by more than two attorneys, the Commonwealth defendants, in contrast, often had three (3) or more attorneys, plus support from numerous specialists.

Thus, the time expended by DVCCCA attorneys was all reasonably necessary to adequately represent the interests of their clients.

TABLE 1
Summary of Legal Work of
Jerome Balter, Esquire

Phase	YEAR 1980	1981	1982	1983	Total
1	-	-	-	-	-
2	-	-	-	-	-
3	2.2	-	-	-	2.2
4	-	292.3	44.8	-	337.1
5	-	145.1	297.8	23.0	465.9
6	-	-	-	17.5	17.5
7	-	-	88.3	-	88.3
8	-	-	-	43.5	43.5
9(a)	-	11.4	6.8	-	18.2
9(b)	-	2.8	28.5	1.8	33.1
Fee	-	44.8	1.0	42.5	88.3
Totals	2.2	496.4	467.2	128.3	1,094.1

TABLE 2
Summary of Legal Work of
James S. Lanard, Esquire

Phase	YEAR 1979	1980	1981	1982	1983	Total
1	29.00	-	-	-	-	29.00
2	37.50	-	-	-	-	37.50
3	54.25	7.5	-	-	-	61.75
4	-	-	394.25	4.50	-	398.75
5	-	-	99.50	6.00	-	105.50
6	-	-	35.50	9.50	-	45.00
7	-	-	-	-	-	-
8	-	-	-	-	-	-
9(a)	-	-	5.00	-	-	5.00
9(b)	-	-	-	4.00	-	4.00
Fee	-	-	13.50	-	-	13.50
Totals	120.75	7.5	547.75	24.00	-	700.00

TABLE 3
Summary of Legal Work of
Albert Slap, Esquire

Phase	YEAR 1979	1980	1981	1982	1983	Total
1	37.0					37.0
2	3.5					3.5
3						
4						
5						
6						
7						
8						
9(a)						
9(b)						
Fee						
Totals	40.5					40.5

TABLE 4
Summary of Legal Work of
Eric Beller, Esquire

Phase	YEAR					Total
	1979	1980	1981	1982	1983	
1	6.9					6.9
2						
3						
4						
5						
6						
7						
8						
9(a)						
9(b)						
Fee	____					6.9
Totals	6.9					6.9

TABLE 5
Summary of Legal Work of
Michael Churchill, Esquire

Phase	YEAR				Total
	1980	1981	1982	1983	
1					
2					
3					
4		1.6	6.50		8.10
5		5.7	29.55		35.25
6					
7			8.15		8.15
8					
9(a)			.40		.40
9(b)					
Fee		____	____		____
Totals		7.3	44.60		51.90

TABLE 6
Summary of Legal Work of
Thomas K. Gilhool, Esquire

Phase	YEAR 1980	1981	1982	1983	Total
1					
2					
3					
4			3.0		3.0
5			13.6		13.6
6			-		-
7			6.8		6.8
8					
9(a)					
9(b)					
Fee			———		———
Totals			23.4		23.4

B. Reasonable Hourly Rates

"The value of an attorney's time generally is reflected in his normal billing rate", Lindy I, 487 F.2d 161, 167 (3d Cir. 1973), but "legal services attorneys and other public interest lawyers do not have normal billing rates because they have no market for their skills." Rodriguez v. Taylor, 569 F.2d 1131, 1250 (3d Cir. 1977); cert. denied, 436 U.S. 913 (1978). Rodriguez established that reasonable rates for attorneys employed by non-profit law firms such as the Public Interest Law Center of Philadelphia (PILCOP) should not be lower than similarly experienced colleagues in commercial practice, 569 F.2d at 1250. See also, Vecchione v. Wohlgemuth, 481 F.Supp. 776 (E.D. Pa. 1979); Halderman v. Pennhurst, 533 F.Supp. 649, 659 (E.D. Pa., 1/26/82).

The rates set forth and requested herein are based on historical principles: i.e., rates which would have been earned in the year the work was performed, rather than current rates, for persons of the same experience level. Information as to the qualifications of the attorneys is presented in the affidavits attached to this petition. The hourly rates requested for each attorney for each particular year are based on surveys made by PILCOP in 1981 and, more recently, in May 1983, by Michael Churchill, Esquire, of the Public Interest Law Center. (See Affidavit attached of Michael Churchill.)

Table 7

Reasonable Hourly Rates

Attorney	Y E A R					
	1979	1980	1981	1982	1983	
Jerome Balter		$ 85	$100	$110	$120	
James S. Lanard	$ 50	$ 65	$ 85	$100		
Albert J. Slap	$ 85					
Eric Beller	$ 50					
Michael Churchill			$140	$150		
Thomas K. Gilhool				$150*		

* In Halderman v. Pennhurst, 533 F.Supp. 649 (E.D. Pa. 1982), District Court Judge Broderick ruled that the $150 hourly rate for Mr. Gilhool was a reasonable rate to be assessed for attorney fees. Id., 533 F.Supp. at 659-660.

C. The Lodestar Calculation

The lodestar was determined by summing up the product of "hours of work" by "hourly rate" for each attorney in the respective year when the work was performed:

Jerome Balter

1980	2.2 hours at $85	$ 187.00	
1981	451.6 hours at 100	45,160.00	
1982	466.2 hours at 110	51,282.00	
1983	85.8 hours at 120	10,296.00	
			$106,925.00

Jerome Balter (Subtotal carried over from prior page) $106,925.00

James S. Lanard

1979	120.75 hours at $ 50	$ 6,037.50	
1980	7.50 hours at 65	487.50	
1981	534.25 hours at 85	45,411.25	
1982	24.00 hours at 100	2,400.00	
			$54,336.25

Albert J. Slap

1979	40.50 hours at $ 85	$ 3,442.50	
			$ 3,442.50

Eric Beller

1979	6.5 hours at $50	$ 345.00	
			$ 345.00

Michael Churchill

1981	7.3 hours at $140	$ 1,022.00	
1982	44.6 hours at $150	6,690.00	
			$ 7,712.00

Thomas K. Gilhool

1982 23.4 hours at $150 $ 3,510.00

$ 3,510.00

Lodestar Amount $176,270.75

(Does Not Include Fee Petition)

The Lodestar may be calculated on the basis of each phase of the work as outlined in Section I(B):

Phase 1	Year	Hours x Rate			
Lanard	1979	29.00 x $ 50	=	$1,450.00	
Slap	1979	37.00 x 85	=	3,145.00	
Beller	1979	6.90 x 50	=	345.00	
					$ 4,940.00
Phase 2	**Year**	**Hours x Rate**			
Lanard	1979	37.50 x $ 50	=	$ 1,875.00	
Slap	1979	3.50 x $ 85	=	297.50	
					$ 2,172.50
Phase 3					
Balter	1980	2.20 x $ 85	=	187.00	
Lanard	1979	54.25 x $ 50	=	$ 2,712.50	
	1980	7.50 x $ 65	=	487.50	
					$ 3,387.00
Phase 4					
Balter	1981	292.3 x $100	=	$29,230.00	
	1982	44.8 x 110	=	4,928.00	
Lanard	1981	394.25 x 85	=	33,511.75	
	1982	4.5 x 100	=	450.00	

Phase 4 (continued)					
Churchill	1981	1.6 x 140	=	224.00	
	1982	6.5 x 150	=	975.00	
Gilhool	1982	3.0 x 150	=	450.00	
					$69,768.75
Phase 5					
Balter	1981	145.10 x 100	=	$14,510.00	
	1982	297.80 x 110	=	32,758.00	
	1983	23.00 x 120	=	2,760.00	
Lanard	1981	99.50 x 85	=	8,457.50	
	1982	6.00 x 100	=	600.00	
Churchill	1981	5.70 x 140	=	798.00	
	1982	29.55 x 150	=	4,432.50	
Gilhool	1982	13.60 x 150	=	2,040.00	
					$66,356.00

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Phase 6					
Balter	1983	17.50 x $120	=	$ 2,100.00	
Lanard	1981	35.50 x 85	=	3,017.50	
	1982	9.50 x 100	=	950.00	
					$ 6,067.50
Phase 7					
Balter	1982	88.30 x $110	=	$ 9,713.00	
Churchhill	1982	8.15 x 150	=	1,222.50	
Gilhool	1982	6.80 x 150	=	1,020.00	
					$11,955.00
Phase 8					
Balter	1983	43.50 x $120	=	$ 5,220.00	
					$ 5,220.00
Phase 9(a)					
Balter	1981	11.40 x $100	=	$ 1,140.00	
	1982	6.80 x 110	=	748.00	

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Phase 9(a) (continued)

Lanard	1981	5.00 x $ 85	=	$ 425.00	
Churchill	1982	.40 x $150	=	60.00	
					$2,373.00

Phase 9(b)

	Year	Hours x Rate			
Balter	1981	2.80 x $100	=	$ 280.00	
	1982	28.50 x 110	=	3,135.00	
	1983	1.80 x 120	=	216.00	
Lanard	1982	4.00 x 100	=	400.00	
					$4,031.00

Summary:

Phase 1	$ 4,940.00
Phase 2	$ 2,172.50
Phase 3	$ 3,387.00

Summary: (continued)

Phase 4	$ 69,768.75	
Phase 5	$ 66,768.75	
Phase 6	$ 6,067.50	
Phase 7	$ 11,955.00	
Phase 8	$ 5,220.00	
Phase 9(a)	2,373.00	
Phase 9(b)	4,031.00	
	$ 176,270.75	Lodestar Amount

D. Adjustment of the Lodestar

After determining the lodestar amount of the fee, an upward adjustment may be made. Lindy I, 487 F.2d 161, 167-69 (3d Cir. 1973); Lindy II, 540 F.2d 102, 117 (3d Cir. 1976); Hughes v. Repko, 578 F.2d 483, 489 (3d Cir. 1978); Copeland v. Marshall, 641 F.2d 880, 892-93 (D.C. Cir. 1980); Sierra Club v. Gorsuch, 672 F.2d 33, 41 (D.C. Cir. 1982); Environmental Defense Fund, Inc. v. Environmental Protection Agency, 672 F.2d 42, 63-64 (D.C. Cir. 1982). The factors which may give rise to an upward adjustment or multiplier include the "contingent nature of the case", Lindy I, 487 F.2d at 167-69, supra; Copeland v. Marshall, 641 F.2d at 892-93; "the

quality of an attorney's work", Lindy II, 540 F.2d at 117; Copeland v. Marshall, 641 F.2d at 893-94; the substantive purpose of the action, Hughes v. Repko, 578 F.2d 483, 489 (3d Cir. 1978); and the benefit received by the public, Sierra Club v. Gorsuch, 684 F.2d 972, 975 (D.C. Cir. 1982).

Very recently, the United States Supreme Court, in a decision concerning attorney fee awards, made special note of the need to adjust the lodestar amount on the basis of the "results obtained":

> "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'"

Hensley v. Eckerhart, ___ U.S. ___, 51 USLW 4552, 4555 (May 16, 1983).

1. Contingent Nature of the I/M Case

As previously noted, this case covers the period since the filing of the Consent Decree in August, 1978, a period of almost five years. Though the original lawsuit was theoretically settled by negotiation leading to the Consent Decree, the enforcement of the obligations of the Decree has taken considerably longer and has involved a considerably greater amount of litigation.

Since the obliging party under the Decree is the sovereign Commonwealth of Pennsylvania and this citizen lawsuit was the first citizen lawsuit to seek

enforcement of the I/M program by a state, there was always the risk that the Commonwealth might find a means to avoid its Consent Decree obligation by reason of the Tenth and Eleventh Amendments to the United States Constitution. Thus, the effort to enforce the Decree was fraught with risk and contingency. Such contingency was increased by the fact that DVCCCA's co-plaintiff, the United States (Environmental Protection Agency) was not always a staunch defender of the Decree, nor of the contempt sanction imposed by the Court to coerce the defendants into compliance.

Had DVCCCA not prevailed in every aspect of this litigation, the probability of being awarded any attorney fee for its efforts to enforce the Decree would be low.

In August 1981, DVCCCA submitted a fee petition for post Consent Decree work. At that time, DVCCCA requested an attorney's fee in the amount of $92,916.75. That request was deferred by the Court and is subsumed within the present updated petition. Nonetheless, the fact that the attorney fee for work prior to August 1981 has still not been awarded is an important factor to be considered by the Court in determining the lodestar multiplier in respect to the present position.

It should also be noted that while PILCOP is a non-profit, tax exempt law corporation, it is not publicly supported; its revenues come from private grants and court awarded attorney fees.

Thus, PILCOP's investment in this litigation represents a considerable risk because DVCCCA plaintiffs are in no position to reimburse PILCOP, nor could PILCOP accept a fee for its services, even if DVCCCA could pay, because acceptance of fees is prohibited under the regulations of the Internal Revenue Service applicable to public interest law firms.

2. Quality of the Attorneys' Work

DVCCCA recognizes that the quality of an attorney's work inheres in the hourly rates used to calculate the lodestar amount of the fee. But an upward adjustment from the lodestar may be considered for work which reflects an exceptional service. Lindy. II, 540 F.2d at 117.

DVCCCA respectfully suggests that in respect to several phases of the legal work, its attorneys rendered exceptional service warranting recognition by this Court. These phases of the work are referred to in Section I(B) as follows:

Phase 4 - Commonwealth Violation of First Modification;

Phase 5 - Commonwealth Legislature Prohibits Compliance;

Phase 7 - Administration of Civil Contempt Sanction.

Phase 4 covers the legal work involved in enforcing the Consent Decree against the attempts of the executive branch of the Commonwealth to delay the implementation of the I/M program as required by the first modification of the Consent Decree. Under Phase 4, the

Court declared the Commonwealth to be in violation of the Decree (Court Order of May 20, 1981) and established a new implementation date of May 1, 1982 (Court Order of June 16, 1981). The Court Order of June 16, 1981 also construed, for the first time, certain Provisions of the Consent Decree dealing with required number of inspection stations, consumer Protection provisions and state audit responsibilities.

The Court Orders of May 20 and June 16, 1981 were strongly contested by the Commonwealth at the Circuit Court level, and the Commonwealth also filed a petition for certiorari with the Supreme Court. At all appellate levels, DVCCCA carried the major load in opposition to the Commonwealth's appeals.

Writing for a unanimous Circuit Court, Circuit Court Judge Garth, in affirming the Court Orders of May 20 and June 16, 1981, said the following:

> "We reject this argument in its entirety. The Commonwealth in effect is asserting that the consent decree into which it entered imposed no real obligation on it to ensure that vehicle inspections took place and that pollutant emissions were reduced. We agree with Delaware Valley that '[s]such an argument would make a mockery of the Consent Decree and would work a cruel hoax on the court.' Delaware Valley Brief at 31." (Emphasis in original.)

DVCCCA v. Commonwealth, 674 F.2d 976, 986-87 (3d Cir. 1982), and thereafter, the Supreme Court denied the Commonwealth's petition for a writ of certiorari.

Phase 5 work covers the period of the legal work which flowed from the Legislature's override of Governor

Thornburgh's veto of H.B. 456, which prohibited fiscal outlays for the I/M program. The District Court is intimately aware of the role played by the individual parties leading to the declaration of defendants' contempt and the imposition of a contempt sanction.

Since the United States plaintiff had not supported the request for contempt, nor the contempt sanction imposed by the Court, DVCCCA carried the burden in opposition to the Commonwealth's motions for stays, appeals and petitions for certiorari.

At issue in these appeals was the relationship of the legislative and administrative branches of government and the enforceability of a federal court consent decree when the state is the obliging Party. These issues, which concern the nature of our federal form

of government in the context of cooperative federalism, were argued in respect to the Clean Air Act for the first time, and therefore, will serve as precedent in the future.

Phase 7 legal work was in defense of the contempt sanction. Most important in this phase was the attempt of the Commonwealth, supported by the United States, to emasculate the sanction by seeking to have practically every highway project declared an "exception" to the sanction. DVCCCA successfully opposed this attempt and preserved the coercive nature of the sanction, thereby causing the Legislature to eventually enact Act 1983-3, which finally authorized the I/M program.

Thus, DVCCCA believes that with respect to Phases 4, 5 and 7, its attorneys merit an upward adjustment from the lodestar amount of the fee.

3. The Substantive Purpose of the Action, the Benefits Received by the Public and the Results Obtained

This action was commenced to enforce the I/M program requirement in the State Implementation Plan. Underlying this enforcement action is the endeavor to reduce the emissions of carbon monoxide and hydrocarbons (ozone forming) from the exhaust pipes of millions of motor vehicles in order to reduce the concentration of these pollutants in the air which 6,000,000 persons breathe in the geographical

areas covered by this lawsuit. The concentration of carbon monoxide or ozone or both in these areas exceeds the national standards and is considered unhealthy, especially for the very young, the elderly and for persons with heart or lung ailments.

The achievement of the Consent Decree was, unfortunately, only the first step toward implementing the I/M program. Vindication of the public's right to clean air through actual implementation of the I/M program following the Consent Decree is also necessary.

The Pennsylvania Constitution, Article 1, §27, provides:

> "The people have a right to clean air, pure water, and to the preservation..of the natural, scenic, historic and esthetic values of the environ-

ment.... As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." (Emphasis added.)

The DVCCCA lawsuit served to remind the Commonwealth of its own constitutional responsibility. It also served to demonstrate that state government must abide by the law and must be a paradigm to induce the private sector into compliance with environmental protection laws.

Thus, the DVCCCA lawsuit has served an important purpose in a democratic society and it will produce a substantial health benefit for millions of individuals. These results, obtained through this litigation, warrant an upward adjustment from the lodestar amount.

4. Lodestar Multiplier

The Court has discretion to adjust the lodestar amount based on the Court's evaluation of the attorneys' work and accomplishments. DVCCCA respectfully suggests that the Court award a lodestar multiplier of two in respect to Phases 4 and 5 of the work, and a lodestar multiplier of three with respect to Phase 7. These proposed multipliers are well within the range of awards of attorney fees by federal courts. Very recently, a federal District Court applied a 4.5 multiplier to the lodestar figure in a case under the Federal Water Pollution Control Act, Municipal Authority of Town of Bloomsburg v. Commonwealth of Pennsylvania, 527 F.Supp. 982, 1,000 (M.D. Pa., 12/10/81); and some courts have awarded full lodestar amounts to

attorneys, in Clean Air Act cases, who had not even prevailed on the substantive issues of the case. Sierra Club v. Gorsuch, 684 F.2d 972 (D.C. Cir. 1982).

If DVCCCA'S proposed multipliers are granted, then the petition award would be as follows:

	Lodestar	Multiplier	Total
Phase 1	$ 4,940.00	1	$ 4,940.00
Phase 2	2,172.50	1	2,172.50
Phase 3	3,387,00	1	3,357.00
Phase 4	69,768.75	2	139,537.50
Phase 5	66,356.00	2	132,712.00
Phase 6	6,067.50	1	6,067.50
Phase 7	11,955.00	3	35,865.00
Phase 8	5,220.00	1	5,220.00
Phase 9(a)	2,373.00	1	2.373.00
Phase 9(b)	4,031.00	1	4.031.00
	$176,270.75		$336,305.00

* * * * *

(Costs of Litigation, Compensation for preparations of Attorney Fee Petition, Conclusion, and Affidavit of Michael Churchill omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al., Plaintiffs	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	NO. 76-2068
UNITED STATES OF AMERICA, Plaintiff	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	NO. 77-619

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA	:	ss
COUNTY OF PHILADELPHIA	:	

JEROME BALTER, being duly sworn according to law, deposes and says that he is an attorney employed by the Public Interest Law Center of Philadelphia (Law

Center) and he further states that the facts set forth in the foregoing DVCCCA Petition for Attorney Fees and in this Affidavit and in the attachments to this Affidavit are true to the best of his knowledge, information and belief. He further deposes and says:

1. The Law Center has been counsel for the Delaware Valley Citizens' Council for Clean Air, et al. (DVCCCA) in respect to all legal aspects of this action.

2. During the period covered by the foregoing Petition for Attorney Fees, August 29, 1978 to August 20, 1981, the following attorneys performed legal work for the Law Center in connection with this action:

Jerome Balter

James S. Lanard

Michael Churchill

Thomas K. Gilhool

Albert J. Slap

Eric Beller

3. (a) Jerome Balter has been employed by the Law Center since 1978. At the Law Center, he has concentrated on environmental protection law representing environmental and community organizations in a variety of enforcement actions against private and governmental offenders of federal environmental pollution laws. In April 1983, Mr. Balter was on the faculty of the Pennsylvania Bar Institute in respect to their annual program on Environmental Law. Mr. Balter's outline and lecture was on the subject of "Citizen Lawsuits Under the Clean Air Act."

In addition to being an attorney, Mr. Balter was a professional engineer with more than thirty (30) years engineering experience. As part of this experience, he was involved in a considerable amount of negotiation on business matters.

Mr. Balter graduated as an engineer from City College of New York in June 1941; he received his degree of Juris Doctor from the Rutgers (Camden) School of Law in 1977. He was admitted to the Bar of Pennsylvania in 1977.

(b) The contemporaneous records maintained by Mr. Balter show that he provided a total of 1,005.8 hours of legal work time to the various phases of this lawsuit up to the time of this Petition. In addition, he has spent 88.3 hours of time in the preparation of fee petitions and responses to Common-

wealth opposition. Attachment A shows the contemporaneous record of Mr. Balter's work on this case.

4. (a) James S. Lanard has worked with the Law Center on numerous environmental matters since 1978. From 1978 through the period of his association with this action, he was associated with the Delaware Valley Citizens' Council for Clean Air as a member of its staff or as its Executive Director. All of Mr. Lanard's work with the Law Center has concentrated on environmental protection concerns. His work with DVCCCA enabled him to become particularly knowledgeable about air pollution problems and about air pollution resulting from motor vehicle emissions. Mr. Lanard is a graduate of the University of Miami School of Law, Class of 1978. He was admitted to the Bar of Pennsylvania in 1978.

(b) The contemporaneous and reconstructed time records of Mr. Lanard show that he devoted a total of 696.5 hours to the various phases of the legal work. In addition, he has spent a total of 13.5 hours of work in respect to fee petition preparation or responses. Attachment B shows the contemporaneous or reconstructed record of Mr. Lanard's work.

5. (a) Albert J. Slap was employed by the Law Center from 1974 through January 1980. At the Law Center, Mr. Slap was Director of the Environmental Project. He left the Law Center to become Deputy City Solicitor for Environment for the City of Philadelphia. Mr. Slap is a graduate of the Villanova Law School, Class of 1974. He was admitted to the Bar of Pennsylvania in 1974.

(b) According to the contemporaneous time records maintained at the Law Center, Mr. SlaP worked a total of 46.5 hours on various phases of the legal work covered by this fee Petition. Attachment C shows the contemporaneous record of Mr. Slap's work.

6. (a) Eric Beller was employed by the Law Center from October 1978 through September 1979. He left his employment with the Law Center to become a law clerk for Federal District Court Judge Norma L. Shapiro. He is presently employed as an Assistant District Attorney in the District Attorney's Office in Philadelphia. Mr. Beller is a graduate of the Yale School of Law, Class of 1978. He was admitted to the Bar of Pennsylvania in 1978.

(b) According to the records maintained at the Law Center, Mr. Beller spent a total of 6.9 hours on various phases of the legal work covered by this fee petition. Attachment D shows the contemporaneous record of Mr. Beller's work.

7. (a) Michael Churchill, a 1965 graduate of Harvard Law School, was a partner at Ballard, Spahr, Andrews & Ingersoll in 1976 when he left to join the Law Center as Managing Partner. At the Law Center he has been responsible for supervising attorneys in the areas of employment, government accountability and environmental matters, as well as the conduct of major trials in the employment area.

(b) The contemporaneous records maintained by Mr. Churchill show that he provided a total of 51.9 hours of legal work on various phases of the work covered by this petition. Attachment E shows the contemporaneous time record of Mr. Churchill's work on this case.

8. (a) Thomas K. Gilhool has been chief counsel at the Law Center since 1975. A graduate of Yale Law School in 1964 and Editor of the Yale Law Journal, he practiced at Dilworth, Paxson, Kalish, Kohn & Levy before serving as the Consumer Advocate and Director of Law Reform Unit at Community Legal Services. Mr. Gilhool joined the faculty at the University of Southern California Law School in 1972 and was an Associate Professor when he returned to Philadelphia in 1975. At the Law

Center, Mr. Gilhool has carried responsibility for major trials in the disabilities area and has overall responsibility for professional practices at the Law Center.

(b) The contemporaneous records maintained by Mr. Gilhool show that he provided a total of 23.4 hours of legal work on the various phases of the work covered by this petition. Attachment F shows the contemporaneous time record of Mr. Gilhool's work on this case.

9. Attachments A-F, inclusive, accurately reflect the hours expended by the respective attorneys on the various phases of the legal work as delineated in Section I(B) of the fee petition.

/s/
JEROME BALTER

Sworn to the subscribed
before me this 3rd day
of June, 1983.

/s/
Notary Public

ATTACHMENT A

Jerome Balter

Date	Phase*	Hours	Description
1/31/80	3	1.0	o Analysis re ozone formation
3/ 3/80	3	1.2	o Signing of Amended Decree
1/31/81	4	1.0	o Analysis of K. Jones' strategy
2/17/81	4	4.3	o Work in respect to Commonwealth's
2/18/81	4	1.7	request for an extention of 20
3/ 2/81	4	1.1	months in Consent Decree

*Phase numbers are related to the various phases of the legal work delineated in Section I(B) of the Petition for Attorney Fees.

3/10/81	4	2.0	o Work in respect to Commonwealth's request for an extension of 20 months in Consent Decree
3/15/81	4	3.8	
3/16/81	4	1.7	
4/ 9/81	4	10.0	o Negotiations re Commonwealth Re-request for 20-month extension
4/10/81	4	2.0	
4/12/81	4	3.0	
4/13/81	4	11.0	
4/15/81	4	8.4	
4/16/81	4	3.0	
4/20/81	4	1.0	
4/21/81	4	1.3	

4/27/81	4	1.8	
4/28/81	4	3.2	
4/29/81	4	2.7	o Commonwealth Motion for 20-month delay
4/30/81	4	14.5	o DVCCCA Motion to declare Common-wealth in violation of Consent De-cree
5/ 1/81	4	1.6	
5/ 4/81	4	1.0	
5/ 5/81	4	1.1	
5/ 6/81	4	5.6	o Court conference on Motions and on-going study and negotiations with Commonwealth
5/ 7/81	4	2.5	
5/ 8/81	4	2.0	
5/11/81	4	0.4	
5/12/81	4	1.3	

5/14/81	4	2.8	
5/21/81	4	1.0	o Analysis of District Court Order of 5/20
6/ 1/81	4	1.7	o Answer to Commonwealth Motion to
6/ 3/81	4	4.5	Reconsider and Comments to Common-
6/ 4/81	4	1.1	wealth Proposed I/M Plans
6/ 5/81	4	7.3	
6/ 6/81	4	9.2	
6/ 7/81	4	8.0	
6/ 8/81	4	7.0	
6/ 9/81	4	3.0	
6/10/81	4	2.5	o District Court Hearing on Proposed I/M Schedule

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
6/15/81	Fee	1.2*	o Preparation of Fee Petition
6/16/81	Fee	1.2*	
6/17/81	Fee	1.0*	
6/24/81	Fee	1.0*	
6/29/81	4	2.5	o Commonwealth Motion to Reconsider
6/30/81	4	2.7	order of 6/16; drafting of Answer
7/ 1/81	4	2.0	
7/ 2/81	4	4.5	

*Indicates hours on research, analysis and drafting of Petition for Attorney Fees.

7/ 6/81	4	3.0	
7/ 7/81	4	8.0	
7/ 8/81	4	7.0	
7/15/81	Fee	1.5*	o Preparation of Fee Petition
7/16/81	Fee	1.5*	
7/17/81	Fee	1.0*	
7/20/81	Fee	2.5*	
7/21/81	Fee	2.0*	
7/21/81	4	1.5	o Meeting with Emission Analyzer Mfr.
7/22/81	Fee	2.0*	o Preparation of Fee Petition
7/28/81	4	3.3	o Conferences with Churchill and Lanard
7/29/81	Fee	1.0*	o Preparation of Fee Petition

7/29/81	4	1.5	o Attend Fed. Ct. Hearing, Schaeffer v. PennDOT
7/31/81	4	4.7	o Commonwealth Motion for Stay Pending Appeal; drafting of Answer; Dkt. #81-2303
8/ 3/81	4	2.0	o Mtg. with Churchill re Stay, Analysis
8/ 4/81	4	5.6	o Comments re PennDOT reports
8/ 5/81	4	5.4	o Response to Commonwealth Motion for Stay in Third Circuit, Dkt. No. 81-2303
8/ 6/81	4	5.0	
8/ 8/81	4	8.0	
8/ 9/81	4	8.0	
8/10/81	4	4.0	
8/19/81	Fee	10.0*	o Drafting of Fee Petition

8/20/81	Fee	9.0*	
9/ 8/81	4	2.7	o Review, reading and analysis of briefs
9/11/81	Fee	3.0*	o Preparation of Supplementary Brief
9/14/81	Fee	3.4*	re Attorneys' Fees (Response to
9/15/81	Fee	3.5*	Commonwealth)
9/15/81	4	1.7	o Review of status of Third Circuit Denial of Stay in Dkt. No. 81-2303
9/16/81	5	2.5	o Research re power of Court to enforce Consent Decree
9/17/81	4	2.2	o Research re Brief to Court of Appeals, Dkt. No. 81-2303

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
9/18/81	4	2.0	o Research re Brief to Court of Appeals
9/21/81	4	2.5	o Meeting with Co-Counsel and preparation for Court hearing
9/22/81	4	2.5	o District Court hearing re I/M progress
9/23/81	4	2.0	o Research and Analysis re Court of Appeals
9/24/81	4	1.5	o Research legislative history of Clean Air Act

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*Indicates hours spent on research, analysis and drafting of Amicus Brief in Scanlon.

9/24/81	4	1.5	o Meeting with EPA attorneys, Koegel and Martin
9/25/81	4	1.5	o Meeting with Co-Counsel re Brief
9/28/81	4	5.7	o Writing of Third Circuit Brief,
9/29/81	4	6.8	Dkt. No. 81-2303
9/30/81	4	4.3	
10/ 1/81	4	4.7	
10/ 2/81	4	3.7	
10/ 3/81	4	3.0	
10/ 4/81	4	7.0	
10/ 5/81	4	4.4	
10/ 5/81	5	1.2	o Preparation of Contempt Motion
10/ 6/81	5	2.5	

10/ 7/81	5	3.5	
10/ 7/81	4	3.6	o Writing of 3d Circuit Brief, Dkt. #81-2303
10/ 8/81	5	6.2	o Preparation of Contempt Motion
10/ 9/81	5	4.7	
10/10/81	5	2.7	
10/11/81	5	5.2	
10/12/81	5	6.8	
10/13/81	5	4.7	
10/14/81	5	5.0	
10/15/81	5	4.7	
10/16/81	5	4.4	o Research for Contempt Motion
10/17/81	5	9.3	o Writing of Contempt Motion and Memo

10/18/81	5	8.7	
10/19/81	5	4.6	o Completion of Contempt Brief
10/19/81	9(a)	0.5	o Preparation of Amicus Brief re
10/21/81	9(a)	0.7	Scanlon v. PennDOT, in re Cmwlth.
			Dkt. #1506 C.D. 1981
10/21/81	4	1.3	o Preparation of Answer to Common-
10/22/81	4	0.7	wealth's Motion for Stay
10/22/81	9(a)	1.2	o Preparation of Amicus Brief in
			Scanlon, Cmwlth Dkt. #1506 C.D. 1981
10/23/81	4	2.4	o Preparation of Answer to Commonwealth's
			Motion for Stay
10/26/81	4	2.3	o Completion of Answer to Commonwealth's
			Motion for Stay

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
10/27/81	9(a)	2.2	o Analysis of Amicus Brief re Burd v.
			PennDOT, No. 1506 Commonwealth Ct. 1981
10/28/81	4	1.0	o Review status of I/M case
10/29/81	9(a)	3.5	o Complete Amicus Brief, Commonwealth
			Dkt. No. 1506 C.D. 1981
10/30/81	9(a)	1.3	o Edit Amicus Brief, Commonwealth Dkt.
			No. 1506 C.D. 1981
11/ 2/81	9(a)	2.0	o Finalize Amicus Brief, Commonwealth
			Dkt. No. 1506 C.D. 1981
11/ 2/81	5/4	3.0	o Read and analyze Commonwealth's and
			EPA's Responses to Contempt Motion

11/ 3/81	5	1.0	o Meeting with Co-Counsel to discuss research
11/ 3/81	5	3.5	o Research and analysis re EPA's and Commonwealth's Responses to Motion for Contempt
11/ 4/81	5	2.2	
11/ 5/81	5	1.3	o Meeting with Co-Counsel re deferring and impossibility
11/ 6/81	5	5.2	o Preparation of memo in re EPA memo of 10/30/81
11/ 9/81	5	1.0	o Review of EPA memo with Co-Counsel
11/11/81	5	2.5	o Research re impossibility

11/13/81	5	1.7	o Review status of case and analyze options
11/17/81	5	1.3	o Research for District Court hearing
11/18/81	5	1.8	o Prepare for Court Hearing and review with Co-Counsel
11/19/81	5	1.3	
11/20/81	5	2.5	o Court Hearing re Contempt Motion
11/23/81	5	4.0	o Research for "Contract Clause" memo ordered by District Court
11/24/81	5	3.2	
11/25/81	5	3.7	
11/29/81	5	4.0	
11/30/81	5	2.9	
12/ 1/81	5	2.3	

12/ 2/81	5	2.5	
12/ 3/81	5	7.3	o Writing of "Contract Clause" memo
12/ 4/81	5	7.8	
12/ 7/81	5	2.0	o Edit memo
12/ 9/81	9(b)	2.8	o Research re PA SIP-1972, 1979 at EPA
12/10/81	5	1.9	o Research re Commonwealth memo on "Contract Clause"
1/ 4/82	5	2.5	o Analysis of EPA Status Report to Court
1/ 5/82	5	2.5	o Comments to Court re Status Report
1/ 6/82	9(b)	2.0	o Letter to EPA (Gorsuch)

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
1/22/82	5	1.5	o Review Judge Bechtle's 1/22/82 Opinion
1/25/82	5	1.5	o Meeting with Co-Counsel to review Judge Bechtle's decision
1/29/82	4	2.0	o Conference with Co-Counsel re Third Circuit Hearing
1/29/82	5	1.0	o Research re Contempt Sanction decision
1/31/82	4	3.0	o Preparation for Third Circuit Court Hearing, Dkt. No. 81-2303
2/ 1/82	4	3.8	
2/ 2/82	4	3.0	o Appearance at Third Circuit Court Hearing, Dkt. No. 81-2303

2/ 8/82	4	1.0	o Read transcript of Third Circuit Court Hearing
2/11/82	5	2.0	o Analyze Commonwealth's Motion for Stay of Contempt Order
2/12/82	5	1.1	o Correspondence to Judge Bechtle and Mr. Ramsey
2/12/82	5	2.5	o Re Stay of Contempt Motion: analysis
2/15/82	5	3.5	of motion; research; writing response
2/16/82	5	6.0	
2/17/82	5	6.0	
2/18/82	5	6.0	
2/19/82	5	5.0	

2/20/82	5	3.0	
2/21/82	5	7.0	
2/22/82	5	2.5	
2/25/82	5	1.5	o Meeting with City re highway funds
2/26/82	5	1.0	o Discussion of Appellate strategy
3/ 2/82	4	3.0	o Review of Third Circuit Court's opinions and conference with M. Churchill
3/ 5/82	5	1.0	o Preparation of Appendix List for Appeal
3/10/82	5	2.0	o Review Commonwealth's Motion for Stay to Third Circuit Court, Dkt. No. 82-1104
3/11/82	5	2.5	
3/12/82	5	6.0	

3/13/82	5	8.0	o Research and writing Brief re Stay Request to Third Circuit Court, Dkt. No. 82-1104
3/14/82	5	8.0	
3/15/82	5	4.0	o Research and writing Brief re Stay; meeting with M. Churchill, No. 82-1104
3/18/82	5	2.5	o Preparation for Circuit Court Oral Argument, Dkt. No. 82-1104

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
3/19/82	5	2.0	o Oral Argument in Third Circuit, Dkt. No. 82-1104
3/22/82	5	11.7	o Research and preparation of Petition for Rehearing, Third Circuit Dkt. No. 82-1104
3/23/82	5	2.5	o Correspondence re I/M
3/24/82	9(b)	1.5	o Research re Appeal of EPA Rule
3/26/82	5	2.5	o Analysis and research re Commonwealth
3/29/85	5	1.5	Appeal Brief and Amicus, Third Circuit
3/30/82	5	1.5	Dkt. No. 82-1104
3/31/82	5	1.0	
4/ 2/82	5	1.5	

4/ 2/82	5	1.5	o Supplement to rehearing petition of
4/ 5/82	5	1.0	DVCCCA in Third Circuit Dkt. No. 82-1104
4/ 7/82	5	2.5	o Study denial of rehearing; discuss
4/ 8/82	5	1.5	alternative courses, Dkt. No. 82-1104
4/ 8/82	5	2.0	o Research and preparation re Appellate
4/ 9/82	5	7.0	Brief, Dkt. No. 82-1104
4/10/82	5	8.0	
4/11/82	5	8.0	
4/12/82	5	5.5	
4/13/82	5	1.5	
4/23/82	5	2.0	o Analysis of United States' Appeal Brief,
			Dkt. No. 82-1104

5/ 2/82	5	3.0	o Analysis of Commonwealth's Reply Brief,
			Dkt. No. 82-1104
5/ 3/82	5	2.0	o Discussion of Reply Briefs with Co-Counsel
5/ 3/82	5	2.5	o Research on Reply Brief cases
5/11/82	5	1.0	o Research re Interrogatories
5/11/82	5	0.8	o Analysis of 1983 Pennsylvania Budget
			re I/M Funding
5/12/82	5	7.0	o Review for Third Circuit Hearing re
			Dkt. No. 82-1104
5/13/82	5	3.5	o Court Hearing on Dkt. No. 82-1104
5/20/82	5	1.5	o Preparation of Motion to Vacate Stay
			re Dkt. No. 82-1104

5/21/82	5	2.0	o Read and analyze Third Circuit's decision in Dkt. No. 82-1104
5/25/82	5	.2	o Review costs re appeals
5/26/82	9(b)	2.5	o Prepare for and testify at DVRCP meeting re I-95 and I-466
5/27/82	9(b)	3.0	
6/ 9/82	5	1.7	o Analysis of Commonwealth's Motion for Stay of Third Circuit decision, Dkt. No. 82-1104, and discussion with Co-Counsel
6/10/82	5	.3	
6/24/82	5	2.0	o Meetings re I/M developments
7/ 8/82	4	3.5	o Preparation of response to Petition for Certiorari, Supreme Court Docket No. 81-2331

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
7/12/82	9(b)	2.0	o Preparation of comments on proposed S.I.P. changes
7/13/82	4	2.0	o Research and response to Certiorari Petition, S.Ct. Dkt. No. 81-2331
7/14/82	4	5.5	
7/15/82	9(b)	1.5	o Complete comments on proposed S.I.P. changes
7/16/82	4	2.5	o Preparation of Brief in Opposition to Petition for Certiorari, S.Ct. Dkt. No. 81-2331
7/17/82	4	4.0	
7/18/82	4	4.0	
7/19/82	4	1.0	

7/20/82	4	2.0	o Meeting with Client, DVCCCA
7/20/82	4	1.0	o Complete Brief in Opposition to Petition
7/21/82	4	1.5	for Certiorari, S.Ct. Dkt. 81-2331
7/26/82	7	2.5	o Research and prepare interrogatories re Federal-aid highway programs
7/29/82	5	3.0	o Prepare Brief in Opposition to Appeal of Commonwealth for Stay, S.Ct. A-103
8/ 2/82	9(a)	0.8	o Meeting with Harry Dower re I/M in Allentown and Bethlehem regions
8/ 2/82	9(b)	1.5	o Preparation for EPA Hearing of 8/10
8/ 2/82	5	1.0	o Meeting with Client, DVCCCA (Keene)
8/ 3/82	5	1.5	o Research and preparation re Appeal
8/ 4/82	5	6.0	for Stay, S.Ct. Dkt. No. A-103

8/ 5/82	5	4.0	
8/ 5/82	9(a)	2.0	o Meeting with Harry Dower re A-B-E
8/ 5/82	5	2.0	o Memorandum in Opposition to Stay,
8/ 6/82	5	2.5	S.Ct. Dkt. No. A-103
8/ 8/82	9(b)	6.0	o Prepare comments for EPA Public Hearing
8/ 9/82	9(b)	4.0	
8/ 9/82	5	2.0	o Read and analyze Commonwealth's Supplement to Appeal for Stay, S.Ct. #A-103
8/10/82	9(b)	2.5	o Appearance at EPA Public Hearing
8/10/82	5	2.5	o Research for Commonwealth's Petition
8/11/82	5	3.5	for Certiorari and discussion
8/12/82	5	3.0	with Co-Counsel, S.Ct. Dkt. No. 82-274

9/ 7/82	9(a)	2.0	o Preparation of stipulation re intervention of SAVE; read petitions; review with Co-Counsel
9/ 7/82	5	0.8	o Correspondence to Congressmen Walgren and Ritter
9/ 8/82	5	0.7	o Meeting with Client, Karen Keene
9/ 9/82	5	1.7	o Media interviews re Supreme Court's refusal to stay and meeting with client, S.Ct. Dkt. No. A-103
9/13/82	9(a)	2.0	o Read and analyze Briefs re Intervention attempt of SAVE
9/14/82	5	0.5	o Aftermath of Supreme Court ruling in S.Ct. Dkt. No. A-103

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
9/17/82	5	2.5	o Discussions with Client and Legislators re I/M
9/18/82	5	2.5	o Research re Supreme Court Brief in
9/19/82	5	3.0	Opposition to Certiorari and conferences,
9/20/82	5	2.0	S.Ct. Dkt. No. 82-274
9/22/82	5	3.0	
9/23/82	5	3.0	
9/23/82	7	0.5	o Review approval of highway safety grants
9/24/82	7	1.0	o Meeting with clients
9/24/82	5	4.0	o Preparation of Brief in Opposition to
9/25/82	5	7.0	Certiorari, S.Ct. Dkt. No. 82-274

9/26/82	5	4.0	
9/27/82	5	10.0	
9/28/82	5	3.0	
9/28/82	4	2.0	o Review safety and pollution abatement
9/29/82	5	7.0	o Finalization of Brief in Opposition
9/30/82	5	1.5	to Certiorari, S.Ct. Dkt. No. 82-274
10/ 1/82	5	8.0	o Review Brief with Co-Counsel and
10/ 4/82	5	1.5	finalize, S.Ct. Dkt. No. 82-274
10/ 5/82	5	1.0	
10/12/82	7	3.5	o Study FHWA certificates re Exceptions;
10/13/82	7	2.0	line up experts
10/14/82	7	3.0	o Prepare Motions for Expedited Discovery
			(analysis and research)

10/15/82	7	0.3	o Preparation of deposition notices
10/18/82	7	3.0	and research
10/19/82	7	3.0	
10/20/82	7	5.5	
10/21/82	7	1.0	o Meeting with Robert Morris (expert)
10/21/82	7	2.5	o Preparation for deposition
10/22/82	7	6.0	o Deposition of Mr. Papet
10/22/82	7	1.0	
10/22/82	7	7.0	o Depositions
10/23/82	7	2.5	o Study and analyze deposition exhibits
10/25/82	7	4.0	o Preparation of memorandum re certi-
10/26/82	7	5.5	fication projects
10/27/82	7	2.0	

10/28/82	7	6.0	
10/29/82	7	2.5	
10/30/82	7	5.0	
10/31/82	7	8.0	
11/ 1/82	7	2.5	
11/ 1/82	5	1.0	o Answer media inquiries re Supreme Court denial of Certiorari in Dkt. No. 82-274
11/ 2/82	7	1.0	o Preparation of memorandum re certification exemption projects and analysis of U. S. memo

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
11/ 3/82	7	3.5	o Preparation for District Court hearing
11/ 4/82	7		re Highway Exceptions
11/ 4/82	7	2.5	o Attend District Court hearing
11/11/82	Fee	1.0*	o Begin preparation of Fee Petition
11/15/82	5	1.0	o Communications re Legislative action
11/22/82	5	1.0	o Legislative Action
11/23/82	5	2.5	
11/24/82	5	1.5	
12/ 3/82	5	1.0	o Prepare for I/M Coalition meeting
12/ 6/82	5	1.0	o Meeting with clients
12/ 7/82	5	1.5	o Press Conference

12/ 8/82	5	1.0	o Meeting with clients and interested parties
12/10/82	5	1.5	o Meeting with Keystone AAA
12/13/82	5	1.0	o Meeting with J. Levin of Senator Spector's office
12/14/82	9(b)	2.0	o Research re EPA regulation on reduced geographical coverage
1/ 4/83	5	.5	o Meeting with clients
1/ 5/83	5	1.5	o Meeting with I/M Committee
1/ 5/83	5	1.0	o Study of Supplemental Submissions of United States
1/18/83	Fee	1.5*	o Fee Petition
1/21/83	5	.5	o Telephone conversation with Zogby of PennDOT

1/25/83	5	1.0	o Review of Legislative initiatives
1/25/83	5	2.0	o Meeting with Zogby, Williams
1/28/83	9(a)	.5	o Re Petition for Mandamus (Hopper), Third Circuit Appeal No. 83-1133
1/28/83	9(a)	.5	o Re City of Pittsburgh Appeal, Third Circuit Appeal No. 83-1032
1/31/83	5	.5	o Meeting with client (Keene)
2/ 3/83	9(b)	1.0	o Letter and Inv. re SIP changes
2/ 7/83	9(b)	.3	
2/ 8/83	9(b)	.5	o Preparation re regulations
2/14/83	5	1.0	o Development re House of Representatives
3/11/83	5	3.0	o Analysis of EEOC v. Wyoming and related cases

3/14/83	5	2.5	o Analysis of Tenth Amendment cases
3/17/83	9(a)	2.0	o Research re City of Pittsburgh Appeal Brief, 3d Cir. Dkt. No. 83-1032
3/18/83	7	2.0	o Research Commonwealth Appeal Brief, Dkt. No. 83-1025
3/21/83	5	6.0	o Meeting in Harrisburg with Zogby and Department of Transportation
3/22/83	7	1.0	o Research Appellate Briefs, Dkt. 83-1025
4/ 4/83	6	3.0	o City of Pittsburgh Brief, Dkt. 83-1032
4/ 5/83	6	3.5	
4/ 6/83	6/7	5.0	o City of Pittsburgh and Commonwealth
4/ 7/83	6/7	4.0	Briefs, Dkt. Nos. 83-1025 and 83-1032

4/ 8/83	6	3.5	o City of Pittsburgh Brief, 83-1032
4/ 9/83	7	3.5	o Brief in Opposition to Commonwealth Appeal, Dkt. No. 83-1025

ATTACHMENT A - Jerome Balter (continued)

Date	Phase	Hours	Description
4/10/83	7	4.0	o DVCCCA Brief re Docket No. 83-1025
4/11/83	7	6.0	
4/12/83	7	5.5	
4/19/83	7	1.0	o Discussion with Clients
4/22/83	5	3.5	o Research re revision of contempt sanction
4/26/83	8	.5	o Consultation with Legislative conferees
5/ 2/83	8	1.0	o Consultation re Legislature

*Indicates hours on research, analysis and drafting of Petition for Attorney Fees.

5/ 4/83	8	6.0	o Analysis of Senate Bill; Research re enforcement of Decree
5/ 5/83	8	6.0	o Letter to Judge Bechtle; legal research meeting with EPA
5/ 6/83	8	3.0	o Research re start-up
5/ 9/83	8	4.0	o Preparation of Stipulated Penalty
5/10/83	8	3.5	Motion
5/11/83	8	4.5	
5/12/83	8	7.0	o Meeting in Harrisburg, Pennsylvania
5/13/83	8	2.0	o Preparation of Memorandum to Court
5/14/83	8	4.0	o Completion of Memorandum to Court
5/16/83	8	2.0	o Court appearance to vacate sanction
5/18/83	Fee	1.0*	o Work on Fee Petition

5/19/83	Fee	2.0*	
5/23/83	Fee	4.5*	
5/24/83	Fee	4.0*	
5/25/83	Fee	4.5*	
5/26/83	Fee	5.0*	
5/27/83	Fee	3.0*	
5/31/83	Fee	5.0*	
6/ 1/83	Fee	5.0*	
6/ 2/83	Fee	6.0*	o Completion of Attorney Fee Petition

ATTACHMENT B

James S. Lanard

Date	Hours	Phase***	Description*
6/23/79**	13.00	3	C
7/ 9/79	5.00	1	A
8/ 9/79	8.00	1	A
9/13/79	5.00	1	A
9/17/79	4.00	2	B

*Letters refer to descriptive paragraphs which appear at end of Attachment C.

**Hours listed are for entire week.

***Phase numbers are related to the various phases of the legal work delineated in Section I(B) of the Petition for Attorney Fees.

9/18/79	3.00	2	B
9/19/79	9.00	1	A
9/10/79	2.00	1	A
9/24/79	0.25	3	C
10/ 1/79	8.00	2	B
10/12/79	3.00	2	B
10/15/79	0.50	2	B
10/29/79	1.00	3	C
11/ 2/79	6.00	2	B
11/ 7/79	0.50	3	C
11/15/79	1.25	2	B
11/16/79	5.00	3	C
11/19/79	5.00	3	C

11/20/79	0.50	2	B
11/23/79	0.50	2	B
11/26/79	6.00	2	B
11/29/79	3.00	2	B
12/ 3/79	2.00	3	C
12/ 4/79	1.75	2	B
12/ 5/79	3.25	3	C
12/ 7/79	0.25	3	C
12/10/79**	13.50	3	C
12/17/79	7.00	3	C
12/19/79	3.50	3	C
1/11/80	0.50	3	C

1/14/80	7.00	3	C

1/15/81	1.00	4	o Work in respect to Commonwealth's
1/20/81	2.00	4	Request for an Extention of 20
1/21/81	1.00	4	Months in Consent Decree
1/22/81	1.25	4	
1/23/81	1.50	4	

ATTACHMENT B - James S. Lanard (continued)

Date	Hours	Phase	Description
1/27/81	1.00	4	o Work in Respect to Commonwealth's
1/28/81	0.50	4	Request for an Extension of 20
1/29/81	1.50	4	Months in Consent Decree
1/30/81	7.00	4	
2/ 2/81	2.00	4	
2/ 3/81	1.00	4	
2/ 4/81	10.50	4	
2/ 5/81	8.25	4	
2/ 6/81	2.75	4	
2/11/81	5.00	4	
2/13/81	2.00	4	

2/17/81	5.00	4	
2/25/81	2.50	4	
2/26/81	3.00	4	
3/ 2/81	2.00	4	
3/ 4/81	0.50	4	
3/11/81	0.50	4	
3/13/81	1.50	4	
3/16/81	3.00	4	
3/17/81	4.25	4	
3/18/81	3.00	4	
4/ 1/81	2.00	4	
4/ 7/81	0.50	4	
4/ 8/81	1.50	4	

4/ 9/81	9.25	4	o Negotiations re Commonwealth Request
4/10/81	8.50	4	for 20-Month Extension
4/13/81	11.00	4	
4/14/81	3.50	4	
4/15/81	9.50	4	
4/16/81	7.00	4	
4/20/81	1.00	4	
4/27/81	5.75	4	
4/28/81	6.25	4	
4/29/81	12.75	4	o Commonwealth Motion for 20-Month Delay
4/30/81	15.75	4	o DVCCCA Motion to Declare Commonwealth
5/ 1/81	1.50	4	in Violation of Consent Decree
5/ 4/81	5.75	4	

5/ 5/81	10.00	4	
5/ 6/81	6.00	4	o Court Conference on Motions and on-
5/ 7/81	1.50	4	going study and negotiations with
5/12/81	2.00	4	Commonwealth
5/13/81	2.00	4	
5/14/81	4.25	4	
5/16/81	1.25	4	
5/21/81	3.00	4	o Analysis of Court Order of 5/20
5/22/81	4.00	4	and Preparation of Air Quality
5/29/81	0.25	4	Data

ATTACHMENT B - James S. Lanard (continued)

Date	Hours	Phase	Description
6/ 1/81	0.50	4	o Answer to Commonwealth Motion to
6/ 2/81	7.25	4	Reconsider and Comments to Common-
6/ 3/81	7.00	4	wealth's Proposed I/M Plans
6/ 4/81	5.50	4	
6/ 5/81	5.75	4	
6/ 7/81	10.00	4	
6/ 8/81	8.00	4	
6/ 9/81	5.00	4	

*Indicates hours of research, analysis and drafting of Petition for Attorney Fees.

6/10/81	2.00	4	o Court Hearing
6/15/81	4.00	4	
6/17/81	3.00	4	
6/18/81	5.00	4	
6/19/81	3.00	4	
6/22/81	5.00	4	
6/23/81	3.00	4	
6/29/81	0.50	4	o Commonwealth Motion to Reconsider
6/30/81	4.25	4	Order of 6/16; drafting of Answer
7/ 1/81	1.00	4	
7/ 2/81	4.00	4	
7/ 6/81	8.00	4	
7/ 7/81	7.00	4	

7/ 8/81	7.50	4	
7/22/81	4.00	4	o Review of Commonwealth's Progress
7/23/81	2.00	4	Reports
7/24/81	2.00	4	
8/ 4/81	7.00	4	
8/ 7/81	1.00	4	o Commonwealth Motion for Stay Pending
8/10/81	6.00	4	Appeal; drafting of Answer
8/18/81	1.00	4	
8/19/81	2.00	4	
8/20/81	3.00*	Fee	
8/24/81	9.00	6	o Research and writing the Legislator's
8/25/81	11.00	6	Petition to Intervene, Third Circuit
8/26/81	8.50	6	

8/27/81	7.00	6	
8/31/81	2.00	4	o Research Commonwealth's Motion for
9/ 1/81	2.00	4	Stay, Third Circuit, Docket No. 81-2011
9/ 2/81	8.00	4	
9/ 4/81	5.00	4	o Prepare documents re Commonwealth's Motion for Stay for Court
9/10/81	5.00*	Fee	o Attorneys' Fee Discovery Request of
9/11/81	2.00*	Fee	Commonwealth
9/14/81	1.50*	Fee	

ATTACHMENT B - James S. Lanard (continued)

Date	Hours	Phase	Description
9/15/81	2.00*	Fee	o Fee Petition Discovery of Commonwealth
9/15/81	1.00	5	o Research on Override of House Bill 456
9/21/81	3.00	4	o Prepare for 9/22 Court Hearing (includes 1.50 hour meeting with Co-Counsel
9/22/81	1.50	4	o District Court Hearing
9/22/81	1.00	4	o Meeting with Co-Counsel before and after Court Hearing
9/23/81	2.00	4	o Prepare Appellate Brief in Pennsylvania Appeal, 3d Cir., Dkt. No. 81-2303

9/23/81	7.00	4	o Meetings with Bucks County Garage Association and with Hamilton Test Systems and PennDOT (Phillips)
9/24/81	3.50	4	o Research Appellate Brief re Pennsylvania's Third Circuit Appeal
9/25/81	1.00	5	o Meeting with Co-Counsel re Override of House Bill 456
9/25/81	1.00	4	o Meeting with Co-Counsel re Third Circuit Appellate Brief
9/28/81	1.00	5	o Issues related to H.B. 456
9/29/81	2.50	5	
10/ 5/81	1.00	5	o Meeting with Co-Counsel re Third Circuit Appellate Brief

10/ 5/81	3.00	4	o Prepare Appellate Brief in Pennsylvania Appeal, 3d Cir., Dkt. No. 81-2303
10/ 5/81	1.50	5	o Meeting with Co-Counsel re H.B. 456
10/ 6/81	2.25	4	o Prepare Appellate Brief in Pennsylvania Appeal, 3d Cir., Dkt. No. 81-2302
10/ 6/81	4.00	5	o Research re H.B. 456 Override
10/ 7/81	6.75	4	o Research re Appellate Brief on Pennsylvania Appeal to Third Circuit
10/ 8/81	2.75	4	o Research re Appellate Brief on Pennsylvania Appeal to Third Circuit, 81-2303

10/ 8/81	3.25	5	o Research re Contempt
10/ 9/81	2.00	4	o Research re Appellate Brief on Pennsylvania Appeal to Third Circuit, 81-2303
10/ 9/81	5.00	5	o Research re Contempt
10/12/81	4.75	5	
10/13/81	6.00	5	
10/14/81	6.00	5	o Research and Writing re Contempt
10/15/81	1.25	5	o Meeting with Co-Counsel re Contempt
10/16/81	1.50	5	o Research re Contempt
10/16/81	1.50	5	o Meeting with Co-Counsel re Contempt

ATTACHMENT B - James S. Lanard (continued)

Date	Hours	Phase	Description
10/19/81	8.00	5	o Prepare Contempt Motion for Court filing
10/21/81	2.00	5	o Research H.B. 466
10/22/81	1.50	5	
10/23/81	1.50	5	
10/26/81	1.25	5	
10/27/81	1.00	5	
10/28/81	1.50	5	
10/29/81	.50	5	

11/ 5/81	4.50	5	o Review of Environmental Protection Agency and Pennsylvania Briefs in Response to DVCCCA Motion re Contempt
11/ 9/81	1.00	5	o Meeting with Co-Counsel re H.B. 456
11/18/81	3.00	5	o Prepare for Court Hearing of 11/20 including 1.75 hour meeting with Co-Counsel
11/19/81	5.00	5	o Preparation of 11/20 Court Hearing
11/20/81	2.50	5	o Hearing on Motion for Contempt
11/23/81	3.00	5	o Prepare "Contracts Clause" Memo Per Order of Judge Bechtle of 11/20/81
11/24/81	4.00	5	
11/25/81	7.00	5	

11/27/81	3.00	5	
11/29/81	3.00	5	
11/30/81	6.00	5	
12/ 1/81	5.00	9(a)	o Trip to Harrisburg in Scanlon case where DVCCCA is Amicus, Commonwealth Docket 1506 C.D. 1981
1/19/82	4.00	9(b)	o Pennsylvania Proposed Change to SIP "Affected Areas"
1/22/82	2.00	5	o Review and Comment on January 22, 1982 Order of Judge Bechtle
1/25/82	4.00	5	o Meeting with Co-Counsel and Respond to Order of Judge Bechtle (Media)

1/28/82	5.00	6	o Prepare Third Circuit Argument re Intervention Hearing on 2/2/82, Dkt. No. 81-2011
1/29/82	5.00	4/6	o Prepare for Third Circuit and conference with Co-Counsel, Dkt. Nos. 81-2011, 81-2303
2/ 1/82	2.00	6	o Prepare Third Circuit Argument for Intervention Hearing on 2/2, Dkt. No. 81-2011

2/ 2/82	2.00	4/6	o Hearing in Third Circuit (1.00 on Intervention; 1.00 hour on Commonwealth Appeal), Dkt. Nos. 81-2011, 81-2303
Total	686.50 Hours + 13.50 Hours Work on Fee Petition		

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ATTACHMENT B - James S. Lanard (continued)

Description of Activities from 6/23/79 - 1/14/80

A - Commonwealth Failure to Comply with Requirements of Consent Decree in Respect to Publication of Proposed I/M Regulations (Includes preparation for and Court Hearings on DVCCCA Motion for Contempt).

B - Revision of Original Consent Decree Time Schedule.

C - Commonwealth Request for First Modification.

ATTACHMENT C

Albert J. Slap

Date	Hours	Phase*	Description
6/ 8/79	0.5	1	Administration and Monitoring of Com-
6/12/79	2.5	1	monwealth performance under Consent
6/13/79	1.5	1	Decree
6/15/79	1.0	1	
6/18/79	1.5	1	
6/19/79	1.0	1	

*Phase numbers are related to the various phases of the legal work delineated in Section I(B) of the Petition for Attorney Fees.

6/20/79	0.5	1	
6/21/79	0.5	1	
6/23/79	1.0	1	
6/29/79	1.5	1	
7/ 2/79	0.5	1	Commonwealth failure to comply with
6/ 3/79	1.0	1	requirements of Consent Decree in re-
7/ 5/79	0.5	1	spect to publication of proposed I/M
7/10/79	0.5	1	regulations
7/11/79	1.0	1	
7/13/79	1.0	1	
7/16/79	0.5	1	
7/18/79	1.0	1	
7/19/79	4.5	1	

7/20/79	1.0	1	
7/30/79	5.0	1	
8/ 3/79	0.5	1	
8/13/79	0.5	1	
8/16/79	1.0	1	
9/10/79	0.5	1	
9/18/79	1.0	1	
9/19/79	3.5	1	Preparation for and Court Hearings on
9/20/79	2.0	1	DVCCCCA motion for contempt
10/10/79	1.5	2	Preparation of new time schedule
12/13/79	2.0	2	caused by Commonwealth delays
Total	40.5		

ATTACHMENT D

Eric Beller

Date	Hours	Phase*	Description
7/27/79	5.0	1	
7/30/79			Failure of Commonwealth to comply with
8/14/79	1.0	1	requirement of Consent Decree re publi-
8/23/79	0.5	1	cation of regulations
8/24/79	0.4	1	
Total	6.9		

*Phase numbers are related to the various phases of the legal work delineated in Section I(B) of the Petition for Attorney Fees.

ATTACHMENT E

Michael Churchill

Date	Phase*	Hours	Description
8/ 5/81	4	.3	o Conference with Balter and Lanard, Third Circuit Dkt. No. 81-2303
8/ 8/81	4	.3	o Conference with Balter re 3d Cir. Dkt. No. 81-2303
9/22/81	4	1.0	o Analysis of remedies in I/M, Dkt. No. 81-2303

*Phase numbers are related to the various phases of the legal work delineated in Section I(B) of the Petition for Attorney Fees.

10/13/81	5	.8	o Analysis of enforcement of consent decree, DVCCCA contempt motion
10/19/81	5	.9	o Conference with Balter re contempt
11/ 3/81	5	.5	
11/ 5/81	5	.5	
11/20/81	5	2.5	o Court hearing re contempt
11/29/81	5	.5	o Analysis re contract clause re contempt
1/22/82	5	1.5	o Analysis of Judge Bechtle's decision
2/ 1/82	4	.2	o Conference with Balter re Third Circuit Dkt. No. 81-2303
2/ 2/82	4	2.5	o Conference with Balter and Third Circuit argument, Dkt. No. 81-2303

2/ 8/82	5	.5	o Review of cross appeal issue re contempt sanction
2/15/82	5	.3	o Analysis of Motion for Stay re Contempt sanction
2/19/82	5	.3	o Conference with Balter re contempt
2/26/82	5	.4	o Conference with Balter re cross appeal issue
3/ 1/82	4	2.0	o Review opinions in Third Circuit Dkt. Nos. 81-2011 and 81-2303
3/ 2/82	4	.5	o Conference with Balter re Third Circuit opinions in Dkt. Nos. 81-2011 and 81-2303

3/15/82	5	1.0	o Conference re stay petition in Third Circuit Dkt. No. 82-1104
3/16/82	5	1.1	o Review draft of brief re stay in 3d Circuit Dkt. No. 82-1104
3/16/82	5	.4	o Discuss oral argument, Dkt. #82-1104
3/18/82	5	1.5	o Conference with Balter re argument on stay, 3d Cir. Dkt. No. 82-1104
3/19/82	5	2.0	o Court of Appeals argument re stay, 3d Cir. Dkt. No. 82-1104
3/22/82	5	.8	o Conference with Balter re appeal to Supreme Court, petition for rehearing en banc, 3d Cir. Dkt. #82-1104

3/23/82	5	.4	o Review of petition for rehearing en banc, 3d Cir. Dkt. No. 82-1104
4/13/82	5	.5	o Conference with Balter
4/14/82	5	.8	o Review brief
4/15/82	9(a)	.4	o Review Burd case, Commonwealth Dkt. No. 1506 C.D. 1981

ATTACHMENT E - Michael Churchill (continued)

Date	Phase	Hours	Description
4/26/82	5	.2	o Analysis
5/ 3/82	5	4.0	o Analysis of reply brief; conference with Balter
5/ 7/82	5	.3	o Analysis re Third Circuit Dkt. No. 82-1104
5/13/82	5	.9	o Court argument, Third Circuit Dkt. No. 82-1104
6/ 9/82	5	.4	o Review stay petition to Third Circuit re Dkt. No. 82-1104
6/11/82	5	1.0	o Analyze Commonwealth Petition re Third Circuit Dkt. No. 82-1104

6/14/82	5	.2	o Review record
6/14/82	5	.2	o Telephone call to Balter re response to Petition in Dkt. No. 82-1104
6/22/82	4	.4	o Analysis of Petition for Certiorari, Supreme Court Dkt. No. 81-2331
7/15/82	4	.5	o Review draft response to Petition for
8/ 9/82	4	.4	Certiorari, Supreme Court Dkt. No. 81-2331
8/10/82	5	.4	o Telephone call to John Karns re enforcement of contractual obligations by the Commonwealth
8/11/82	5	2.0	o Conference with Balter

8/17/82	5	.3	o Analysis of Government's Brief, S.Ct. Dkt. No. 82-274; telephone call from Karen Keene
8/18/82	5	.1	o Telephone call to Balter
8/19/82	5	1.0	o Telephone call to Krill; letter requesting extension
8/23/82	5	.1	o Conference re Commonwealth letter
8/27/82	5	.3	o Telephone call to Dover re intervention
9/ 9/82	5	.1	o Conference re denial of stay, Supreme Court Dkt. No. A-103
9/10/82	5	.4	o Conference re press

9/20/82	5	.8	o Conference with Balter and Gilhool re S.Ct. Dkt. 82-274
9/22/82	5	.5	o Conference with Balter re S.Ct. Dkt. 82-274
9/23/82	5	.5	o Conference re alternatives, S.Ct. Dkt. 82-274
9/28/82	5	.2	o Conference with Balter re S.Ct. Dkt. 82-274
9/30/82	5	.5	o Analysis of Balter's draft re S.Ct. Dkt. 82-274
10/ 1/82	5	.9	o Review and edit draft with Balter, S.Ct. Dkt. 82-274

10/ 4/82	5	.4	o Review of summary; telephone call to International Printing, S.Ct. Dkt. 82-274

ATTACHMENT E - Michael Churchill (continued)

Date	Phase	Hours	Description
10/ 5/82	5	.4	o Review proof, S.Ct. Dkt. No. 82-274
10/ 6/82	5	1.0	o Review proof, S.Ct. Dkt. No. 82-274; letter to Cramer
10/ 7/82	5	.2	o Mail briefs; letter to Cramer, S.Ct. Dkt. No. 82-274
10/12/82	5/7	1.5	o Denial of Certiorari in S.Ct. Dkt. No. 82-274; receipt of exemption claims
10/12/82	7	.5	o Discussion of expert and means of opposing exemptions
10/14/82	7	.3	o Miscellaneous

10/18/82	7	.3	o Read Government's Brief re highway exceptions
10/19/82	7	.4	o Conference with Balter re highway exceptions
10/21/82	7	.4	o Conference with Balter re direction of discovery re highway exemptions
10/25/82	7	1.0	o Analysis of witness testimony
10/26/82	7	.8	o Analysis with Balter re highway ex-
10/27/82	7	2.0	emptions
11/ 4/82	7	1.2	o Court hearing before Judge Bechtle re highway exemptions
11/ 9/82	7	.1	o Analysis of Judge Bechtle's opinion
11/19/82	7	.2	re highway exemptions

ATTACHMENT F

Thomas K. Gilhool

Date	Phase*	Hours	Description
1/26/82	5	1.75	o Analysis re contempt
2/ 2/82	4	3.00	o Conference with Balter and attend Court of Appeals argument, Dkt. No. 81-2303
2/12/82	5/7	.75	o Conference with Balter re Discovery and Stay

*Phase numbers are related to the various phases of the legal work delineated in Section I(B) of the Petition for Attorney Fees.

4/ 5/82	5	3.00	o Analysis and conference with Balter re Third Circuit Dkt. No. 82-1104
4/ 6/82	5	3.00	o Review documents
5/13/82	5	2.00	o Attend oral argument, Third Circuit Dkt. No. 82-1104
6/10/82	5	1.50	o Conference with Balter re Third Circuit Dkt. No. 82-1104
9/20/82	5	.70	o Brief in Opposition to Certiorari Petition, Supreme Court Dkt. No. 82-274
9/20/82	5	.40	o Conference with Balter re Opposition to Certiorari, Supreme Court Dkt. No. 82-274

9/23/82	7	1.70	o Review of exceptions to contempt sanction re highways
9/30/82	5	1.00	o Conference with Balter re Brief in opposition to Certiorari, Supreme Court Dkt. No. 82-274
10/28/82	7	.60	o Conference re memorandum on highway exceptions
11/ 3/82	7	1.50	o Telephone conference
11/ 4/82	7	2.50	o Attend Court hearing re highway exemptions

* * * * *

(Affidavit of Robert L. Morris and Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, et al., Plaintiffs	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	NO. 76-2068
UNITED STATES OF AMERICA, Plaintiff	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	NO. 77-619

PLAINTIFFS' RESPONSE TO DEFENDANTS FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiffs, DVCCCA, et al., respond to Defendants' First Set of Interrogatories and Request for Production of Documents Pursuant to Rules 33 and 34 of the. Federal Rules of Civil Procedure, dated June 17, 1983 and received June 20, 1983, as follows:

1. In regard to Albert Slap:

a.) Are there any documents which contain a contemporaneous record of the hours and the dates that said hours were spent in relation to the claim?

RESPONSE: Yes.

b.) If so, please identify all such documents.

RESPONSE: See Attachment "A" (Daily Time Sheets of Albert Slap).

c.) If so, please state the date that each document was prepared.

RESPONSE: See dates on Attachment "A." They were prepared contemporaneously.

d.) If so, please produce a copy of all such documents.

RESPONSE: See Attachment "A."

e.) If time is claimed for which there is no contemporaneous document recording said time, please identify: (a) the method by which said time was reconstructed, (b) the date said reconstruction was prepared, (c) the person who prepared said reconstruction, (d) all documents by which said reconstruction was calculated and (e) please produce a copy of all such documents.

RESPONSE: Not applicable.

2. In regard to Eric Beller:

a.) Are there any documents which contain a contemporaneous record of the hours and the dates that said hours were spent in relation to the claim?

RESPONSE: Yes.

b.) If so, please identify all such documents.

RESPONSE: See Attachment "B" (Daily Time Sheets of Eric Beller).

c.) If so, please state the date that each document was prepared.

RESPONSE: See dates on Attachment "B." They were Prepared contemporaneously.

d.) If so, please produce a copy of all such documents.

RESPONSE: See Attachment "B."

e.) If time is claimed for which there is no contemporaneous document recording said time, please identify: (a) the method by which said time was reconstructed, (b) the date said reconstruction was prepared, (c) the person who prepared said reconstruction, (d) all documents by which said reconstruction was calculated and (e) please produce a copy of all such documents.

RESPONSE: Not applicable.

3. In regard to James S. Lanard:

a.) Are there any documents which contain a contemporaneous record of the hours and the dates that said hours were spent in relation to the claim?

RESPONSE: Yes.

b.) If so, please identify all such documents.

RESPONSE: See Attachment "C" (handwritten Time Sheets of James S. Lanard).

c.) If so, please state the date that each document was prepared.

RESPONSE: See appropriate date column on Attachment "C."

d.) If so, please produce a copy of all such documents.

RESPONSE: See Attachment "C."

e.) If time is claimed for which there is no contemporaneous document recording said time, please identify:

(a) the method by which said time was reconstructed,

RESPONSE: See Attachment "C.3" (Memorandum of 6/18/81 re Lanard's Reconstruction of Time for 6/23/79 through 1/14/80);

(b) the date said reconstruction was prepared,

RESPONSE: June 18, 1981;

(c) the person who prepared said reconstruction,

RESPONSE: James S. Lanard, Esquire;

(d) all documents by which said reconstruction was calculated

RESPONSE: Documents are too numerous to list; see record of the case;

(e) please produce a copy of all such documents.

RESPONSE: Documents are too numerous to copy; see record of the case.

4. In regard to Jerome Balter:

a.) Are there any documents which contain a contemporaneous record of the hours and the dates that said hours were spent in relation to the claim?

RESPONSE: Yes.

b.) If so, please identify all such documents.

RESPONSE: See Attachment "D" (Daily Time Sheets of Jerome Balter).

c.) If so, please state the date that each document was prepared.

RESPONSE: See dates on Attachment "D." They were prepared contemporaneously.

d.) If so, please produce a copy of all such documents.

RESPONSE: See Attachment "D."

e.) If time is claimed for which there is no contemporaneous document recording said time, please identify: (a) the method by which said time was reconstructed, (b) the date said reconstruction was prepared, (c) the person who prepared said reconstruction, (d) all documents by which said reconstruction was calculated and (e) please produce a copy of all such documents.

RESPONSE: Not applicable.

5. In regard to Michael Churchill:

a.) Are there any documents which contain a contemporaneous record of the hours and the dates that said hours were spent in relation to the claim?

RESPONSE: Yes.

b.) If so, please identify all such documents.

RESPONSE: See Attachment "E" (Daily Time Sheets of Michael Churchill).

c.) If so, please state the date that each document was prepared.

RESPONSE: See Attachment "E." They were prepared contemporaneously.

d.) If so, please produce a copy of all such documents.

RESPONSE: See Attachment "E."

e.) If time is claimed for which there is no contemporaneous document recording said time, please identify: (a) the method by which said time was reconstructed, (b) the date said reconstruction was Prepared, (c) the person who prepared said reconstruction, (d) all documents by which said reconstruction was calculated and (e) please produce a copy of all such documents.

RESPONSE: Not applicable.

6. In regard to Thomas K. Gilhool:

a.) Are there any documents which contain a contemporaneous

record of the hours and the dates that said hours were spent in relation to the claim?

RESPONSE: Yes.

b.) If so, please identify all such documents.

RESPONSE: See Attachment "F" (Daily Time Sheets of Thomas K. Gilhool).

c.) If so, please state the date that each document was prepared.

RESPONSE: See dates on Attachment "F." They were prepared contemporaneously.

d.) If so, please produce a copy of all such documents.

RESPONSE: See Attachment "F."

e.) If time is claimed for which there is no contemporaneous document recording said time,

please identify: (a) the method by which said time was reconstructed, (b) the date said reconstruction was prepared, (c) the person who prepared said reconstruction, (d) all documents by which said reconstruction was calculated and (e) please produce a copy of all such documents.

RESPONSE: Not applicable.

7. In regard to James S. Lanard:

a.) Please state the month in 1978 that he was admitted to the Bar of Pennsylvania.

RESPONSE: October.

b.) Please identify, from said month in 1978 to the present:

i. Every employer.

RESPONSE:

(a) Delaware Valley Citizens' Council for Clean Air;

(b) New Jersey Environmental Lobby;

(c) Drexel Universlty;

(d) Rutgers University;

(e) Public Interest Law Center of Philadelphia (PILCOP).

ii. The dates of said employment.

RESPONSE:

(a) September 1978 through January 1982;

(b) February 1982 to the present;

(c) Spring 1980-1981;

(d) Spring 1983;

(e) Late 1980, early 1981.

iii. The duties associated with said employment.

RESPONSE:

(a) Executive Director and Staff Attorney;

(b) Legislative agent and counsel:

(c) Adjunct Assistant Professor teaching Environmental Health Law in the Graduate School;

(d) Adjunct Assistant Professor teaching Natural Resources Law;

(e) Consultant

c.) In regard to his employment with Delaware Valley Citizens' Council for Clean Air, please

identify and produce all documents which describe his required duties with said organization.

RESPONSE: Not available.

8. In regard to Jerome Balter:

a.) Please state the month in 1977 that he was admitted to the Bar of Pennsylvania.

RESPONSE: November.

b.) Please identify, from said month in 1977 to the present:

i. Every employer.

RESPONSE:

(a) Self-employed;

(b) Public Interest Law Center of Philadelphia (PILCOP).

ii. The dates of said employment.

RESPONSE:

(a) 1977-1978;

(b) 1978 to the present.

iii. The duties associated with said employment.

RESPONSE:

(a) Specialized in occupational safety and health law; workers' compensation: wrongful discharge law.

(b) Staff attorney and Director of the Environmental Project.

9. Please identify any and all documents, agreements, contracts, or any other grants of funds to the Public Interest Law Center or any plaintiff

group which contain a provision restricting litigation against the Commonwealth of Pennsylvania for the recovery of attorney's fees.

RESPONSE: None.

PULIC INTEREST LAW CENTER
OF PHILADELPHIA

By: /s/
Jerome Balter

1315 Walnut Street,
Suite 1632
Philadelphia, PA 17107

Date: July 1, 1983

* * * * *

(Certificate of Service and attachments A-F to Response to Interrogatories omitted in printing).

ASSOCIATE FEE RATES

Question: What is the most common hourly fee rate:

Associates under 2 years in practice

CATEGORY	# Replies	Dollar($) Mean	Mode	Q1	Median	Q3	D9
N AMERICA	110	59	50	50	60	65	70
REGION							
NY City	6	75	70	70	73	85	85
Chicago	5	58	--	54	60	62	63
New England	16	55	50	49	53	63	69
Mid-Atlantic	16	61	55	52	58	68	74
Southeast	10	58	55	50	58	65	70
South Cntrl	5	52	55	49	54	55	55
East Cntrl	18	57	60	51	59	60	68
West Cntrl	13	55	50	50	55	60	71
Southwest	8	60	60	55	60	65	68
Pacific Cst	13	65	65	64	65	70	77
CITY POP							
Und 100M1	12	48	50	40	50	50	59
100M1-500M	21	55	55	49	55	60	75
500M1-1MM	17	57	50	50	55	65	65
1MM1-2MM	32	61	60	57	60	68	70
2MM1 & Over	28	66	65	55	65	70	85
LEGAL STAFF							
Und 11 Lyrs	21	57	50	50	55	63	72
11-20 lwyrs	24	57	50	50	55	65	75
21-30 Lwyrs	14	61	50	50	60	70	76
31-50 Lwyrs	20	57	60	54	59	60	65
51-70 Lwyrs	11	60	60	51	60	65	76
71 & More	20	63	70	60	64	70	70

CHART CONTINUED ON NEXT PAGE

ASSOCIATE FEE RATE

Question: What is the most common hourly fee rate:

Associates 2 to 4 years in practice

CATEGORY	# Re-plies	Dollar($) Mean	Mode	Q1	Median	Q3	D9
N AMERICA	113	69	70	60	70	75	85
REGION							
NY City	5	86	--	79	90	93	94
Chicago	6	64	60	60	63	70	73
New England	16	67	70	55	70	75	85
Mid-Atlantic	13	70	70	60	65	73	96
Southeast	10	65	60	66	60	80	83
South Cntrl	6	60	50	50	63	66	68
East Cntrl	22	65	70	60	65	70	76
West Cntrl	15	67	65	60	65	75	80
Southwest	8	75	75	73	75	78	83
Pacific Cst	12	78	75	68	75	90	96
CITY POP							
Und 100Ml	13	56	50	49	50	65	68
100Ml-500M	22	64	55	55	60	70	78
500Ml-1MM	19	67	65	61	66	74	78
1MM1-2MM	31	72	75	66	75	79	85
2MM1 & Over	28	75	70	62	73	85	95
LEGAL STAFF							
Und 11 Lyrs	21	65	60	54	60	66	94
11-20 Lwyrs	27	64	65	55	65	75	84
21-30 Lwyrs	14	70	75	65	73	75	86
31-50 Lwyrs	20	68	70	60	70	75	75
51-70 Lwyrs	11	72	70	61	70	79	91
71 & More	20	76	70	70	75	85	85

CHART CONTINUED ON NEXT PAGE

ASSOCIATE FEE RATE

Question: What is the most common hourly fee rate:

Senior associates over 4 years in practice

CATEGORY	# Re-plies	Dollar($) Mean	Mode	Q1	Median	Q3	D9
N AMERICA	102	80	85	70	80	90	100
REGION							
NY City	6	109	110	100	110	115	116
Chicago	6	73	70	65	70	80	86
New England	13	81	80	74	80	91	101
Mid-Atlantic	14	79	70	67	73	85	100
Southeast	10	72	60	60	72	85	95
South Cntrl	4	70	-	60	70	80	80
East Cntrl	20	76	75	65	75	89	95
West Cntrl	11	78	75	70	75	84	100
Southwest	9	88	85	84	85	89	106
Pacific Cst	9	88	100	74	90	100	109
CITY POP							
Und 100Ml	12	57	50	50	53	65	71
100MI-500M	14	74	75	65	75	85	85
500MI-1MM	16	79	80	70	80	85	89
1MM1-2MM	32	84	85	73	85	93	100
2MM1 & Over	28	91	100	75	93	103	113
LEGAL STAFF							
Und 11 Lyrs	20	71	60	58	66	75	100
11-20 Lwyrs	21	76	75	64	75	86	100
21-30 Lwyrs	12	80	85	70	80	85	111
31-50 Lwyrs	18	82	85	70	85	88	97
51-70 Lwyrs	11	84	75	75	75	96	104
71 & More	20	92	90	83	90	98	108

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TYPICAL HOURLY BILLING RATES BY STATE

UNDER 2 YEARS OF LEGAL EXPERIENCE

	No. OF FIRMS	AVERAGE RATE $	NUMBER OF FIRMS REPORTING RATE OF							
			UNDER $40	$40-$44	$45-$49	$50-$54	$55-$59	$60-$64	$65-$69	OVER $69
FLORIDA	11	65				3		2	1	5
ILLINOIS	22	57		3	1	6	2	4	1	5
INDIANA	15	54		1	2	7	1	1	1	2
MICHIGAN	17	53		2	2	4	5	2	1	1
NORTH CAROLINA	12	50		3	1	5	1	1	1	
OHIO	32	53	2	1	3	13	4	5	2	2
PENNSYLVANIA	29	51	3	3	3	9	4	5		2
TEXAS	22	60	1			4	3	6	2	6

TYPICAL HOURLY BILLING RATES BY STATE

2 AND 3 YEARS OF LEGAL EXPERIENCE

	No. OF FIRMS	AVERAGE RATE $	NUMBER OF FIRMS REPORTING RATE OF ---- UNDER $55	$55-$59	$60-$64	$65-$69	$70-$74	$75-$79	OVER $79
FLORIDA	13	75		1	3	2		2	5
ILLINOIS	24	64	7	2	4	1	3	4	3
INDIANA	19	60	5	3	3	5	1	1	1
MICHIGAN	15	63	3	2	1	5	1	3	
NORTH CAROLINA	13	54	6	2	4		1		
OHIO	33	60	8	6	2	6	7	1	1
PENNSYLVANIA	29	61	8	6	6		2	5	2
TEXAS	23	72	1	1	1	2	3	8	7

TYPICAL HOURLY BILLING RATES BY STATE

4 AND 5 YEARS OF LEGAL EXPERIENCE

	No. OF FIRMS	AVERAGE RATE $	NUMBER OF FIRMS REPORTING RATE OF UNDER $60	$60-$69	$70-$79	$80-$89	$90-$109	$110-$124	$125-$149	OVER $149
FLORIDA	13	85		2	4	1	5		1	
ILLINOIS	24	77	2	6	4	5	6	1		
INDIANA	16	68	3	4	7	2				
MICHIGAN	16	75	3		8	4	1			
NORTH CAROLINA	13	59	6	5	2					
OHIO	36	69	6	9	14	5	1	1		
PENNSYLVANIA	32	68	6	13	6	3	4			
TEXAS	20	87		1	4	6	7	1	1	

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMMONWEALTH OF PENNSYLVANIA *et al.*,
Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PETITIONER COMMONWEALTH OF PENNSYLVANIA

JAY C. WALDMAN
General Counsel
HENRY G. BARR
Executive Deputy
General Counsel
SPENCER A. MANTHORPE
Chief Counsel
Department of Transportation
JOHN M. HRUBOVCAK
Assistant Counsel
Department of Transportation
JOHN P. KRILL
Deputy General Counsel
(Counsel of Record)
Attorneys for Petitioners

Office of General Counsel
Commonwealth of Pennsylvania
Post Office Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether likelihood of success may be used as a factor in the multiplier for an award of attorney's fees, even in cases where the losing party essentially bore the burden of proof and persuasion?

2. Whether the Circuit Court's affirmance of the award of multipliers of 2 and 4 by the District Court, prior to the decision of this Court in *Blum v. Stenson*, is in clear conflict with *Blum v. Stenson* because the District Court relied on improper factors, such as novel issues, and used conclusory language, completely failing to articulate any factual justification for the enormous multipliers awarded?

3. Whether 42 U.S.C. § 7604(d) authorizes attorney's fees for non-litigation activities such as submitting comments on draft regulations and providing comments at a public hearing, which are available to all citizens as a means of communicating with government?

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DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF PETITIONER COMMONWEALTH OF PENNSYLVANIA

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals (Pet. App.[1] 46a-70a) is reported at 762 F.2d 272 (3d Cir. 1985).

The memorandum and order of the District Court (Pet. App. 1a-45a) is reported at 581 F.Supp. 1412 (E.D. Pa. 1984).

JURISDICTION

The order of the Court of Appeals was entered May 14, 1985. The Petition for Writ of Certiorari was docketed on July 3, 1985. Certiorari was granted on October 7, 1985.

---

[1] "Pet. App." refers to the appendix to the Petition for Writ of Certiorari filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Clean Air Act, § 304(d), as amended, 42 U.S.C. § 7604(d) (1982) (formerly codified at 42 U.S.C. § 1857h-2(d)(1976)):

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This case involves an order awarding attorney's fees to Delaware Valley Citizens' Council for Clean Air (hereinafter "Delaware Valley") in the amount of $216,488.03 for work involving the Pennsylvania vehicle emission inspection and maintenance program (hereinafter the "I/M program"). The issues presented involve the award of multipliers of 2 and 4 for certain phases of the litigation and the award of fees for non-litigation activities.

In 1977, Delaware Valley and the United States sued the Commonwealth of Pennsylvania, the Secretary of the Pennsylvania Department of Transportation and the Secretary of the Pennsylvania Department of Environmental Resources (hereinafter "state officials") to force them to implement an I/M program in certain counties in Pennsylvania. Such a program involves establishing inspection stations for measuring automobile tailpipe emissions of hydrocarbons and carbon monoxide by means of an analyzer, mandating such inspections and requiring that vehicles which exceed a specified level of emissions have repairs performed to reduce the emissions. Delaware Valley was represented in the suit by attorneys from the Public Interest Law Center of Philadelphia.

In August 1978, a consent decree was signed and approved by the United States District Court for the Eastern District of Pennsylvania. The decree provided for the inspection of the exhaust emissions of certain vehicles in ten counties in Pennsylvania. In 1978 the Commonwealth paid Delaware Valley attorney's fees for work done prior to the consent decree; those fees are not involved in this appeal. After the decree, however, there were other activities for which Delaware Valley has requested payment of its attorney's fees.

Specifically, in fee petitions filed on August 24, 1981 (J. App.[2] 50a-86a) and June 6, 1983 (J. App. 87a-263a), Delaware Valley sought attorney's fees for work performed from 1979 to 1983. Delaware Valley categorized the work in nine phases, as did the District Court in deciding the issue of attorney's fees. These nine phases include: (I) filing an unsuccessful motion to show cause, (II) commenting on draft regulations, (III) negotiating a first modification to the consent decree, (IV) opposing a request by state officials to modify the consent decree further, (V) opposing a motion for a stay and a modification of the consent decree and obtaining a finding of contempt and the imposition of sanctions, (VI) opposing intervention motions, (VII) opposing the approval of seven highway projects as exemptions from the funding limitations ordered by the District Court, (VIII) vacating sanctions, and (IX) filing an amicus brief before a state court in a related case and participating in public hearings for a revision of the State Implementation Plan relating to the I/M program.

---

[2] "J. App." refers to the joint appendix filed in this case.

In addition, Delaware Valley requested a multiplier of 2 for phases IV and V and a multiplier of 3 for phase VII (J. App. 171a)[3]. Delaware Valley's stated basis for the award of a multiplier was the contingent nature of the I/M case, the quality of the attorneys' work, the substantive purpose of the action, the benefits received by the public and the results obtained (J. App. 157a-172a).

The state officials contested the award of any multiplier, the award of a lodestar for certain work and the award of fees to a member of the plaintiff group. By order dated February 24, 1984, the District Court awarded attorney's fees (Pet. App. 1a-45a).

Most relevant to this case, the court below awarded a lodestar fee of $69,454.50 and then increased it by multipliers of 2 and 4, which added $124,199.50. These multipliers were applied in connection with three phases of work: Phases IV, V and VII. The multipliers were awarded after the District Court had awarded what it had described as "a high hourly rate" (Pet. App. 25a) to Delaware Valley's counsel and reduced the number of hours claimed by almost fifty percent.

For Phase IV, the District Court awarded $36,711.50 as the lodestar and a multiplier of 2, for a total award of $73,723.00 (Pet. App. 43a). It based that multiplier on its unexplained conclusions that "[t]he contingent nature of plaintiffs' success has been apparent throughout this litigation" and that "[t]he case involved new and novel issues" (Pet. App. 39a).

Phase IV involved a partially successful attempt by state officials to modify the consent decree. In mid-1980, the United States designed an improved emission analyzer to be used to test vehicles for emissions in the emission inspection program. The United States urged states to use the new analyzer and provided for additional time to implement an emission program to allow for manufacturer development time. State officials negotiated with the United States and Delaware Valley over a proposal to modify the consent decree to permit use of the new analyzer, but agreement could not be reached with Delaware Valley. State officials filed a motion to modify the consent decree. Delaware Valley filed a motion to declare state officials in violation of the consent decree and submitted ten pages of requested modifications to the consent decree including stipulated penalties, payment of administrative costs to Delaware Valley and attorney's fees.

[3] The opinion of the District Court contains a typographical error in referring to the request of a multiplier of 2 for Phases V and VI, rather than for Phases IV and V (Pet. App. 38a).

On May 20, 1981, the District Court, without hearing and after requiring parties to continue negotiations, issued an order which refused the state officials' request for an extension of time to use the new analyzer and denied the modifications requested by Delaware Valley. On June 16, 1981, the District Court approved an implementation plan submitted by state officials with three modifications (J. App. 29a-49a). The matter was decided solely on briefs, the decision was affirmed by the Third Circuit Court of Appeals, and certiorari was denied. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 674 F.2d 976 (3d Cir.), *cert. denied*, 459 U.S. 905 (1982).

For Phase V, the District Court awarded $27,372.50 as the lodestar and a multiplier of 4 for a total award of $109,490.00 (Pet. App. 43a). Here, the multiplier was based on quality of plaintiff's work as well as the contingent nature of their success and the novelty of the issues (Pet. App. 39a, 40a).

Phase V involved a request by state officials to modify the consent decree and Delaware Valley's partially successful attempt to have them held in contempt. In 1981

state officials were implementing the emission inspection program with all deadlines being met, including establishment of a scholastic program to train and certify over 1500 mechanics, certification of numerous stations through the first step of a two-step certification process, development of a public information program, development of other phases of the program and defense of the program in state court actions. On October 5, 1981, however, the General Assembly of the Commonwealth passed legislation, over the veto of the Governor, which prohibited the use of state funds to implement the I/M program. Based on that legislative action, state officials filed a motion for a stay and a modification of the consent decree. Delaware Valley filed a motion to declare state officials in contempt, to impose daily fines and to obtain attorney's fees. On January 22, 1982, the District Court denied the motion of the state officials and found them in contempt, but denied the remainder of Delaware Valley's motion. Devising its own sanction, the court prohibited the use of federal funds for transportation projects in ten counties, except for projects which were certified by the United States to be for safety or mass transit or related to air quality improvement. The Third Circuit affirmed the decision, after granting a stay, and certiorari was denied. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982).

For Phase VII, the District Court awarded $5,370.50 as the lodestar and a multiplier of 2 for a total award of $10,741.00 (Pet. App. 43a). Here again, the multiplier was based on the court's conclusion concerning Delaware Valley's low likelihood of success (Pet. App. 39a).

Phase VII concerned state officials' partially successful efforts to obtain exemptions from the District Court's prohibition on federal funding. In late 1982, pursuant to the order of January 22, 1982, seven projects were certified by the United States as projects that would improve safety because they would reduce deaths and accidents or would improve air quality. The certification documents were provided to the court and to Delaware Valley. On November 9, 1982, the District Court, on the basis of the certified documents of the United States and briefs of the parties, found that five of the projects did not qualify as exemptions under the terms of its order and that two of the projects did qualify as exemptions (Pet. App. 71a to 85a).

Finally, the District Court awarded attorney's fees to Delaware Valley for providing comments to draft regulations and for submitting comments at a public hearing. On August 18, 1979, draft regulations for the emission program were published in the Pennsylvania Bulletin, the Commonwealth's official journal, for comment by the general public. Delaware Valley and other persons submitted comments. Delaware Valley labeled this as Phase II of the attorney's fees petition. The District Court awarded $1,722.50 in attorney's fees for this activity (Pet. App. 17a to 18a). In 1982, a public hearing was held in Philadelphia by the Environmental Protection Agency to consider modifications to the State Implementation Plan (a general plan to consider emission reductions from a variety of sources). Delaware Valley submitted comments at the public hearing. Delaware Valley labeled these comments as part of Phase IX in the attorney's fees petition. The District Court awarded $1,453.00 in attorney's fees for this activity (Pet. App. 36a to 37a).

State officials filed an appeal from certain aspects of the order of February 24, 1984 [4], and Delaware Valley filed a cross-appeal. The District Court issued an order

[4] Petitioners limited their appeal to the award of the multiplier, the award of attorney's fees for certain types of activities and the award of fees to the Executive Director of Delaware Valley. The court order regarding all other aspects, including the number of hours and the hourly rate awarded, was not challenged by Petitioners.

staying the judgment of February 24, 1984, pending the appeal.

On May 14, 1985 the Court of Appeals for the Third Circuit affirmed the order of the District Court with Judge Becker dissenting on the issue of the multipliers (Pet. App. 46a to 70a). The majority held simply that multipliers can be awarded for quality of work and the contingent nature of success and that the District Court had not abused its discretion in making such an award. Dissenting Judge Becker found that the risk of lack of success was not sufficient to justify any multiplier in this case and that the award of a multiplier for the quality of the work should be vacated and remanded for reconsideration in light of this Court's decision in *Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541 (1984) (Pet. App. 69a n.12). The Third Circuit granted a stay.

A Petition for Writ of Certiorari was filed, and this Court granted the Petition on October 7, 1985.

SUMMARY OF ARGUMENT

In *Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541 (1984), this Court held that multipliers should be awarded only in rare and exceptional cases. The Court also characterized a 50% multiplier as substantial, rejected the use of unsupported conclusions, held that neither complexity nor novelty of the issues is an appropriate factor in determining whether to increase the basic fee award, and rejected the concept of double counting. The order in this case, which awarded multipliers of 2 and 4 in various phases of the litigation, violates each of these concepts.

In three conclusory paragraphs, using language similar to that used by the District Court in *Stenson v. Blum*, 512 F. Supp. 680, 685 (S.D.N.Y.), *aff'd mem.*, 671 F.2d 493 (2d Cir. 1981), *rev'd*, —— U.S. ——, 104 S.Ct. 1541 (1984), the District Court in this case added

$124,199.50 to the presumptively reasonable attorney's fees. The District Court's opinion, much like that in *Stenson v. Blum*, rests on unsupported conclusions that "[t]he quality of plaintiffs' work was superior" (Pet. App. 39a); "[t]he contingent nature of plaintiffs' success has been apparent throughout this litigation" (Pet. App. 39a); and "[t]he case involved new and novel issues, the resolution of which had little or no precedent" (Pet. App. 39a). This Court rejected the use of such unsupported conclusions in *Blum* and should do so again in this case.

The District Court further compounded the error by double counting for quality. The District Court first awarded a high hourly rate for admittedly "inexperienced attorneys" (Pet. App. 62a), and then increased the fee with a multiplier for quality. This double counting for quality was especially inappropriate here since the District Court had reduced the number of hours claimed by Delaware Valley's attorneys by almost 50% on the ground that those hours were excessive.

The District Court further increased the multiplier for likelihood of success. Although, in *Blum*, this Court explicitly left open the propriety of considering that factor in awarding a multiplier, it should now hold that likelihood of success should not be considered as a factor in increasing the basic attorney fee award. No fee may be awarded for services on unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Yet, awarding an upward adjustment for the risk of losing has the inevitable effect of compensating an attorney for unsuccessful claims in unrelated cases.

Moreover, using likelihood of success as a factor increases attorney's fees most where the defendants had the strongest, albeit unsuccessful, defense. It would be incongruous, and inappropriately punitive, to award the largest fees against those defendants who are most justi-

fied in defending their actions. The application of a multiplier in this case was especially inappropriate, since state officials carried a heavy burden of persuasion in each of the phases for which a multiplier was awarded.

The District Court, in the basic fee award, awarded attorney's fees for submitting comments to a draft regulation and for participating in public hearings to a State Implementation Plan revision. Neither activity resulted in litigation, nor did they require the participation of attorneys. The Clean Air Act provides for attorney's fees for "litigation" but does not include the more encompassing term "proceedings." Further, attorney's fees should not be awarded for communicating with the government in non-litigation activities which are open to the general public and which do not require the presence of an attorney. The Clean Air Act never provided for such widespread public funding of attorneys.

ARGUMENT

A. LIKELIHOOD OF SUCCESS SHOULD NOT BE A FACTOR TO BE CONSIDERED IN INCREASING THE BASIC FEE AWARD.

Likelihood of success is a factor which is inherently included in a basic fee award.[5] Any further increase for this factor is improper for several reasons.

Likelihood of success, like novelty and complexity of the issues, is presumed to be fully reflected in the basic fee award in the number of billable hours recorded by counsel and the hourly rate awarded. *See Blum v. Stenson*, —— U.S. ——, ——, 104 S.Ct. 1541, 1548-1549 (1984). Specifically, in a case where success is achieved

[5] Consideration of likelihood of success as a factor in a fee award should not be confused with the question of whether the fee was fixed or contingent. Delaware Valley and the District Court have frequently referred to "contingency of success" or the like in justifying a fee multiplier. This "contingency" is simply the likelihood of success.

against high odds, that success will presumably be the result of either a high number of reasonable billable hours being spent on the case or the special skill and experience of counsel. Additional hours will, of course, be awarded directly and "the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates." —— U.S. at ——, 104 S.Ct. at 1549. Also, integral components in evaluating the likelihood of success are the novelty of the issues and the complexity of the case. As the integral components may not be used to justify an upward adjustment, because these are already subsumed in the basic fee award, the factor which they comprise may not be used for any upward adjustment. Thus, an additional award for the likelihood of success is double counting and is not an appropriate factor in determining any upward adjustment to the basic fee award.

Further, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), analyzing a similar fee shifting statute—the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988—this Court found a congressional intent that fees be awarded only to prevailing parties and that no attorney's fees be granted for claims unrelated to those on which relief was obtained. The Court stated that "the congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Hensley*, 461 U.S. at 435.

The Court has found similar Congressional intent behind the Clean Air Act provisions at issue here—that fees be awarded only to prevailing parties. *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). A contingency multiplier is inconsistent with that intent.

Specifically, awarding an upward adjustment to the lodestar for the risk of losing and not obtaining an award

of attorney's fees is not unlike compensating an attorney for unsuccessful claims in unrelated cases. *Murray v. Weinberger*, 741 F.2d 1423, 1431 (D.C. Cir. 1984). As the Court of Appeals for the District of Columbia stated in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 27-28 (D.C. Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 3488 (1985):

> The same logic which restricts compensation to those portions of a lawsuit directly related to the relief procured also forbids multiplying attorneys fees so as effectively to compensate counsel for other, losing claims which may be brought. The prevailing party may expect full compensation for prevailing claims; there is no provision for compensating losing, unrelated claims in the same case, or other losing cases which might or might not involve the same parties.

Moreover, to multiply all awards for the risk of losing would, in essence, generate a pool of legal fees sufficient to compensate all attorneys bringing all suits. This result was explicitly rejected in *Laffey*, where the court found that "[w]hile such a scheme is arguably desirable, it clearly is not the one adopted by Congress." *Laffey*, 746 F.2d at 27.

That result was also rejected by the Seventh Circuit in *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1985). In holding that the risk of losing alone would not justify the use of a multiplier, the court made the following analysis:

> Suppose a plaintiff asks for and received a multiplier of 2 because he had a 50 percent chance of losing the case. This means that if the plaintiff's lawyer tries 10 such cases and wins 5 (as one would expect, if the risk of loss is indeed 50 percent), he will be paid as if he won them all; that is, he will be paid twice his normal charge for each of the 5 cases he won, to compensate him for getting nothing in the 5 cases he lost. Indeed, if the logic of the risk multiplier were applied consistently, the attorney's fee would be larger the riskier the case, even though this would mean rewarding lawyers for flooding the courts with unmeritorious litigation, something we very much do not need. Imagine a class of cases where only one in 50 plaintiffs prevails. Then the risk multiplier would be 50, and a lawyer who brought all 50 cases and lost 49 would receive the same compensation that he would have received had he been certain to win all 50 cases (in which event there would be no multiplier), rather than virtually certain to lose 98 percent of them.

Thus, a multiplier which is based on likelihood of success requires, in effect, that defendants who lose in one case compensate the plaintiff's attorney for other cases where the defendants won and for which the attorney received no fees. The defendant in the case that the attorney won, in all probability, has no involvement at all in other cases that the attorney lost. Yet, the multiplier now is used to link that losing defendant to those other cases and to subsidize the attorney's fees for those cases. As was stated in *Laffey*, 746 F.2d at 27 n.138, "[i]f the contingency argument is based on the notion that fees in this risky case may affect expenses of other unsuccessful suits, the problem of encouraging marginal litigation is compounded by the reasonable question of why the subsidy [for unsuccessful litigation] should come from the defendants in another case."

Also, the award of a multiplier based on likelihood of success punishes those defendants who have the greatest justification for defending. The likelihood of success factor increases attorney's fees where the defendants had a strong, but ultimately unsuccessful, defense—that is, when the plaintiff was least likely to prevail. Thus, defendants are penalized for defending a case where the balance of precedent and of evidence was relatively favorable to them. Yet, these are the cases which should be

defended. Simply stated, "it is ludicrous for violators with a relatively good case to have their payments multiplied while those of flagrant violators are not." J. Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L. J., 473, 490 (1981).

Moreover, the use of likelihood of success in the multiplier would make a marginal case as attractive to bring as a very strong case, attracting competent counsel away from prosecuting a clear violation of right in favor of cases with a higher potential award. *Laffey*, 746 F.2d at 27 n.138. It has been suggested that this could set in motion "market" forces leading to a situation in which every conceivable claim would be litigated, subject only to the ability of the courts to handle the burden. As noted in *Laffey*, 746 F.2d at 27, if the capacity of the judicial system remained constant, these marginal claims would displace cases with a greater probability of success. The net effect would be a dilution in the deterrent force of the statutes.

Finally, the use of a multiplier creates a possibility of monumental attorney's fees awards. For example, in a case where a reasonable hourly rate is $100 but the chances of success were only 10%, the effective hourly rate awarded as a result of a multiplier would be $1000. This fee is unreasonable by any standard and, therefore, inconsistent with the language and purpose of the fee shifting statutes.

B. THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT INCREASING THE BASIC FEE AWARD BECAUSE OF LIKELIHOOD OF SUCCESS.

Even if a multiplier is permissible based on likelihood of success, this is not an appropriate case for the award of a multiplier.

The District Court awarded a multiplier for likelihood of success (Pet. App. 39a), stating that the "contingent"

nature of plaintiffs' success had been apparent throughout this litigation and that they prevailed on questions where likelihood of success was least. Not surprisingly, no analysis of likelihood of success was made by the court, since its conclusions are unsupportable.

A consent decree was signed in 1978 and attorney's fees were paid for that aspect of the case. The post-decree phases of litigation for which multipliers were awarded involved issues where the state officials essentially bore the burden of proof and persuasion. Thus, it was they, not Delaware Valley, who had little probability of success.

Phase IV involved a motion to modify the consent decree to use an improved emission analyzer designed by the United States. The analyzer would be used to test the vehicles for emissions in the I/M program. The United States urged the states to use the new analyzer and provided additional time to implement the I/M program to allow for manufacturer development time. State officials negotiated with the United States and Delaware Valley over a proposal to modify the consent decree to permit use of the new analyzer, but agreement could not be reached with Delaware Valley. State officials filed a motion to modify the consent decree, and Delaware Valley filed a motion in opposition and to declare state officials in violation of the decree.

Phase V involved a request by state officials to stay and to modify the consent decree. In 1981, while state officials were developing the I/M program, with all deadlines being met, the General Assembly passed legislation, over the veto of the Governor. The legislation prohibited the use of state funds to implement the I/M program. Based on that legislative action, state officials filed a motion for a stay and for modification of the consent decree. Delaware Valley filed a motion in opposition and to declare state officials in contempt, to impose daily fines

and to obtain attorney's fees. The District Court denied the motion of state officials, found them in contempt, but denied the remainder of Delaware Valley's motion.

In Phases IV and V, state officials had a formidable challenge in seeking to modify and to stay the consent decree under the strict standards established in prior cases by the Third Circuit. In the Third Circuit, the standard for reopening a consent decree is a strict one, and any relief is "extraordinary" and may be granted only upon a showing of "exceptional circumstances." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977). It is more difficult to modify a consent decree than an order issued in a case which was litigated. *Vecchione v. Wohlgemuth*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977). The person seeking relief has the "heavy burden" of showing circumstances so changed that "dangers, once substantial, have become attenuated to a shadow." *United States Steel Corp. v. Fraternal Association of Steel Haulers*, 601 F.2d 1269, 1274 (3d Cir. 1979).

Under the standards of the Third Circuit, the state officials faced this formidable challenge. In marked contrast, Delaware Valley enjoyed the clear advantage of established case law placing this extreme and heavy burden on state officials. For Phase IV, in seeking to modify the consent decree, the state officials had the "heavy burden" of proving "exceptional circumstances." *Delaware Valley Citizens' Council*, 674 F.2d at 982. Likewise, for Phase V, which involved a motion for contempt and a motion to stay and to modify the consent decree, state officials had the burden of meeting the stringent and formidable requirements to modify the consent decree.

For Phase VII, the District Court reviewed the state officials' request that it exempt seven highway projects from an order enjoining the use of any federal aid highway funds except where the Federal Highway Administration certified that the projects would improve safety or improve air quality (Pet. App. 76a-77a). The United States certified seven projects and these certifications were then filed with the court. For this phase the District Court stated that the state officials had "the burden to prove that each project for which they now seek exemption from the remedy has as its primary purpose the safety and the improvement of air quality" (Pet. App. 78a). The District Court refused to accept the certification of five projects under the terms of its own order (Pet. App. 71a to 85a).

Since the state officials in this case had such a heavy burden to bear in succeeding on the merits, it is incredible that the court could state that Delaware Valley's "likelihood of success was least" on these issues (Pet. App. 39a). Consequently, from the entry of the initial decree, with the consent of the state officials, until the District Court's last order, Delaware Valley's counsel have enjoyed a significant advantage which made their work less difficult and the fact that they prevailed unremarkable.

C. THE AWARD OF MULTIPLIERS OF 2 AND 4 IS IN CLEAR CONFLICT WITH THE DECISION OF THIS COURT IN *BLUM v. STENSON* BECAUSE THE DISTRICT COURT RELIED ON IMPROPER FACTORS AND USED CONCLUSORY LANGUAGE, COMPLETELY FAILING TO ARTICULATE ANY FACTUAL JUSTIFICATION FOR THE INCREASE.

As we have demonstrated, a multiplier for likelihood of success is improper under any circumstances, and is especially inappropriate under the circumstances of this case. In addition, insofar as the lower court relied on other factors in awarding a multiplier in this case, it did so without benefit of this Court's decision in *Blum v. Stenson*, and in conflict with that decision.

In *Blum*, the Court stated that a multiplier should be employed only in rare and exceptional cases and held that certain factors, such as complexity, novelty, and the number of persons benefited, could not be utilized at all to justify multipliers. The Court also rejected the use of "double counting" and conclusory statements to justify an increase in the basic fee. —— U.S. at ——, 104 S.Ct. at 1548-1550.

Lower courts that have had the benefit of *Blum* have recognized the fundamental change in attorney's fees effected by that decision. *See, e.g., May v. Cooperman*, 582 F. Supp. 1458, 1462-1463 (D.N.J. 1984). Not surprisingly, since it did not have the benefit of that decision, the District Court erroneously relied on unsupported conclusions, engaged in double counting and implicitly or explicitly relied on novelty and complexity of the issues. The award of the enormous multipliers of 2 and 4 in this case is, therefore, in clear conflict with *Blum*.

1. The award of a multiplier for quality is the kind of "double counting" rejected in *Blum*.

In this case, the District Court awarded a high hourly rate in the basic fee award even though counsel were inexperienced. On the other hand, it drastically reduced hours for which compensation was awarded because the number of hours claimed were inappropriate and excessive. It then awarded a substantial multiplier based on the quality of counsel's work. That increase for quality is wholly inconsistent with the court's finding that counsel spent excessive time on this litigation and is, in addition, "double counting" in light of the high hourly rate awarded.

For Phases IV, V and VII, the District Court compensated Delaware Valley's attorney at the hourly rate of $100 in the basic fee award (lodestar). For Phase IV, the District Court described that rate as a "high hourly rate" and justified it as the prevailing rate for "lead

counsel in any complex litigation" (Pet. App. 25a). For Phase V, the District Court based that rate on "an attorney with a high degree of skill" (Pet. App. 29a-30a). For Phase VII, the District Court found "such rates [as] being reasonable for the activities performed" (Pet. App. 33a).

Delaware Valley had requested hourly rates of from $100 to $120 for one of its attorneys, Jerome Balter, for these phases. In making that request, Delaware Valley candidly admitted that "the rates requested are not average rates and in particular that the rate proposed for Mr. Balter is at the high end of the range for lawyers graduating in 1977" (Delaware Valley Citizens' Council's Reply to Commonwealth's Response In Re DVCCA's Petition for Attorney Fees and Costs, p. 29, filed Oct. 5, 1983). Thus, by its own admission, Delaware Valley received a high hourly rate in the basic fee award to compensate for quality. For any upward adjustment, it had the burden of proving that this was a "rare case" where the quality of service rendered was superior to what one reasonably should expect in light of the hourly rates charged and that the success was exceptional. *Blum*, —— U.S. at ——, 104 S.Ct. at 1549. Delaware Valley introduced no specific evidence.

To the contrary, as the Court of Appeals noted, "the vast bulk of the work was performed [for Delaware Valley] by Balter and Lanard, both inexperienced attorneys. Balter was admitted to the bar in 1977 and Lanard in 1978 (when the litigation was already underway) and neither had any prior significant litigation experience" (Pet. App. 62a n.10).

The quality of representation factor is most arguably appropriate in situations where an attorney performs work significantly superior to that to be expected of those with a similar level of experience and in a most efficient manner in a short period of time. In this case,

the lack of experience and the inefficiency of Delaware Valley's counsel, both of which are evidenced by the large number of hours that the District Court eliminated from the hours claimed, preclude any increase for quality.

Tables 1 and 2, which follow, detail the hours claimed by the attorneys and the hours awarded by the District Court for these three phases. A comparison of these two tables shows that Delaware Valley's number of hours billed was reduced upon review by the District Court by almost fifty percent because they were found inappropriate and excessive.

Thus, the District Court awarded a high hourly rate to inexperienced attorneys whose claim for reasonable hours was found to be excessive and was dramatically reduced by the Court. Any further addition for quality would be double counting under the standards of *Blum*, —— U.S. at ——, 104 S.Ct. at 1549.

TABLE 1—HOURS CLAIMED

Attorney	Phase IV (J. App. 106a)	Phase V (J. App. 113a)	Phase VII (J. App. 120a)
Balter	337.10	465.9	88.30
Lanard	398.75	105.5	0
Churchill	8.10	35.25	8.15
Gilhool	3.00	13.60	6.80
	746.95	620.25	103.25

TABLE 2—HOURS AWARDED

Attorney	Phase IV (Pet. App. 25a)	Phase V (Pet. App. 30a)	Phase VII (Pet. App. 33a)
Balter	330	210	50
Lanard	52	88	0
Churchill	5.1	20	5.7
Gilhool	0	6.1	0
	387.1	324.1	55.7

2. Reliance on novel issues and complexity is an improper basis to increase the basic fee award.

In *Blum*, this Court found that novelty and complexity are not appropriate factors in determining whether to increase the basic fee award. —— U.S. at ——, 104 S.Ct. at 1548-1549. In this case, in discussing the award of multipliers, the District Court stated that "[t]he case involved new and novel issues" and that "plaintiffs had to defend their rights" on numerous occasions (Pet. App. 39a). The latter statement is just another way of saying that the case was complex. As in *Blum*, no further elucidation of these improper factors was made. Reliance on these factors, implicitly or explicitly, is in conflict with *Blum* and, therefore, inappropriate.

3. The award of the enormous multipliers employing conclusory statements is in conflict with *Blum*.

As evidenced by the present case, the use of a multiplier is the single factor which can result in an enormous increase in an attorney's fees award. In this case, multipliers of 2 and 4 were awarded, increasing the presumptively reasonable attorney's fees by approximately $124,000, in a few brief paragraphs using conclusory statements. This failure to explain the factual basis for the award of a multiplier is inconsistent with this Court's statement in *Blum* that multipliers should be awarded only in rare and exceptional cases. Certainly, if multipliers are to be the rare exception, their use should have to be justified in significant detail.

In this case, the District Court awarded a multiplier of 2 for Phase IV, amounting to $36,711.50 (Pet. App. 43a); a multiplier of 4 for Phase V, amounting to $82,117.50 (Pet. App. 43a); and a multiplier of 2 for Phase VII, amounting to $5,370.50 (Pet. App. 43a). The award of these multipliers was justified solely by unsup-

ported conclusions that "likelihood of success was least" (Pet. App. 39a) and that for these phases of the litigation "plaintiffs' work was superior" (Pet. App. 40a). These incredible few words, unsupported by any analysis, are all that were used to justify an enormous additional judgment against state officials.

These unsupported conclusions are no different from the findings of the district court in *Stenson v. Blum*, 512 F. Supp. 680, 685 (S.D.N.Y.) *aff'd mem.*, 671 F.2d 493 (2nd Cir. 1981), that "[t]he quality of representation was high" and that "[t]he issues presented were novel, and the undertaking therefore risky," conclusions which this Court found inadequate to support the award of a "mere" 50% multiplier in that case. *Blum v. Stenson*, —— U.S. at ——, 104 S.Ct. at 1549-1550. The use of similarly conclusory statements in the present case, awarding even higher multipliers, must likewise be rejected.

The present case is not unlike many other cases throughout the country. District court orders awarding multipliers using double counting, stating conclusory language, and failing to articulate clearly the basis for the increase are not unusual and have been reviewed and reversed by courts of appeals. *See e.g. Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 264 n.25 (8th Cir. 1985) (double counting); *Murray v. Weinberger*, 741 F.2d at 1429 (failure to articulate basis for adjustment); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 923-924 (6th Cir. 1984) (failure to articulate basis for adjustment); *Blim v. Western Electric Co.*, 731 F.2d 1473, 1480 (10th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 233 (1984) (failure to articulate basis for adjustment); *Hall v. Bolger*, 768 F.2d 1148, 1150-1151 (9th Cir. 1985) (double counting (by implication), failure to articulate basis for adjustment). Because the courts in this case made exactly the same error, even after this Court's decision in *Blum*, they should be reversed.

D. ATTORNEY'S FEES ARE NOT PERMITTED FOR NON-LITIGATION ACTIVITIES SUCH AS SUBMITTING COMMENTS ON DRAFT REGULATIONS AND PROVIDING COMMENTS AT A PUBLIC HEARING, WHICH ARE AVAILABLE TO ALL CITIZENS AS A MEANS OF COMMUNICATING WITH GOVERNMENT.

The District Court awarded attorney's fees under Section 304(d) of the Clean Air Act to Delaware Valley's attorneys for submitting comments at a public hearing (Phase IX) and for commenting on regulations (Phase II). Because these activities neither involved litigation, nor required an attorney's presence, attorney's fees cannot be awarded for them.

Section 304(d) of the Clean Air Act, *as amended*, 42 U.S.C. § 7604(d), provides:

> The court, in issuing any final order *in any action brought* pursuant to subsection (a) of this section, may *award costs of litigation* (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure. (Emphasis added.)

Attorney's fees are clearly limited to costs of "litigation" for "actions brought" under Section 304 of the Clean Air Act. The statute was carefully drawn and excludes the more encompassing term "proceedings," as opposed to other attorney's fees statutes that provide for fees for "any action or proceeding." *See* Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988; Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

1. Participation at a Public Hearing on the State Implementation Plan.

First, the District Court awarded attorney's fees of $702 because Delaware Valley submitted comments to the

United States at a public hearing on the 1982 State Implementation Plan (SIP). The award was unjustified, in light of the statutory framework governing submission of comments to state implementation plans and the absence of a challenge by Delaware Valley to the SIP as ultimately approved.

Section 110 of the Clean Air Act, 42 U.S.C. § 7410, provides for the development and submission of state implementation plans and modifications. An opportunity for the general public to be heard must precede Environmental Protection Agency (EPA) approval of a SIP or any major proposed change to it. The public hearing may be conducted by the state or by the federal officials. *Appalachian Power Company v. Environmental Protection Agency*, 477 F.2d 495, 502 (4th Cir. 1973). *See also City of Seabrook v. United States Environmental Protection Agency*, 659 F.2d 1349, 1357 n.13 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982); *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 584 (5th Cir. 1981). The public hearing requirements for a SIP are contained in 40 C.F.R. § 51.4 (1983). The regulation calls for the state to prepare and to retain for the administrator of EPA a record of each hearing. After that hearing, the administrator of EPA may approve the SIP.

If the administrator of EPA approves the SIP, that approval may then be challenged in the court of appeals (not the district court) in which the state submitting the plan is located. Clean Air Act, Section 307(b), 42 U.S.C. § 7607(b). Further, attorney's fees for a successful challenge to the approval of a SIP in the court of appeals are provided for under Section 307(f) of the Clean Air Act, *as amended*, 42 U.S.C. § 7607(f), and not under the statutory provision involved in this case, 42 U.S.C. § 7604(d). Section 307(f) limits attorney's fees to judicial proceedings.

The Pennsylvania draft SIP included numerous elements. One of those elements under consideration was a reduction in the coverage area for the I/M program. Delaware Valley submitted comments opposing the proposed change in the coverage area. Nevertheless, under the 1982 SIP as ultimately submitted to the United States Environmental Protection Agency for approval, the I/M areas for Pittsburgh and Allentown-Bethlehem-Easton were in fact reduced, as the state officials had proposed; the federal authorities approved this SIP. 47 Fed. Reg. 54,808-54,810 (1982). No litigation challenging the federal approval was ever filed in the Court of Appeals.

Other courts have rejected the award of fees for such activity. In *Florida Power & Light Co.*, 650 F.2d 579, the power company participated in the administrative process of a SIP revision by submitting comments. Following this participation, it successfully challenged the approval of the SIP in the court of appeals, pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), as required by the statute. Florida Power then applied for attorney's fees for the administrative proceedings and the judicial proceedings. The Fifth Circuit awarded attorney's fees for the judicial proceedings but not administrative proceedings, holding that Section 307(f) of the Clean Air Act authorizes attorney's fees only for judicial proceedings. *Florida Power & Light Co. v. Costle*, 683 F.2d 941, 943 (5th Cir. 1982).

In *Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency*, 711 F.2d 431 (1st Cir. 1983), the court reviewed the attorney's fee provision of the Clean Water Act, 33 U.S.C. § 1365(d). This section is identical with the Clean Air Act, 42 U.S.C. § 7604(d). The court found no statutory authority for awarding attorney's fees for non-judicial proceedings, such as work on the agency hearing. 711 F.2d at 438 & n.12. The attorney's fee provision of

the Clean Water Act contains only the word "actions" and not the more inclusive words "action or proceeding" that are found in other statutes. The court found that the world "proceeding" is broader than the word "action" and includes administrative as well as judicial proceedings. However, the term "action" is more limited, referring to civil litigation. 711 F.2d at 438 & n.12. The identical analysis applies to the fee provisions of the Clean Air Act. Attorney's fees should not be permitted for any administrative proceedings.

This Court in *Webb v. Board of Education*, —— U.S. ——, 105 S.Ct. 1923 (1985), further considered the phrase "action or proceeding" in regard to an award of attorney's fees for administrative proceedings under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. This Court, even when the statute contained the additional word "proceedings," further limited any award of attorney's fees for work in administrative proceedings to situations where the statute requires the claimant to pursue available state remedies before commencing proceedings in a federal forum. —— U.S. ——, 105 S.Ct. at 1927-1928.

Under the explicit terms of the statute, attorney's fees are, therefore, not permitted to Delaware Valley for participating at a public hearing where no litigation resulted.

2. Submission of Comments to Draft Regulations.

Second, the Court awarded attorney's fees of $1,722.50 for the submission of comments to draft regulations that were published for comment in the Pennsylvania Bulletin. On August 18, 1979, the draft regulations were published in the Pennsylvania Bulletin (the state equivalent of the Federal Register) for comment by all interested people within thirty days. On September 17, 1979, the thirtieth day, Delaware Valley submitted its comments. Publication of draft regulations in the Pennsylvania Bulletin with a thirty day comment period is a requirement

of state law. Pa. Stat. Ann. tit. 45, §§ 1201, 1203 (Purdon Supp. 1984-85). The United States and other interested parties also submitted comments on the draft regulations. These regulations were republished in draft form in the Pennsylvania Bulletin on October 27, 1979. Comments were submitted again by Delaware Valley, the United States, and other parties. These regulations were adopted as final regulations on December 22, 1979. No litigation resulted from the adoption of these regulations except for the litigation over attorney's fees. The court, however, awarded counsel fees of $1,722.50, which included $1625 at $65 per hour to reimburse James Lanard. Lanard at this time was employed by Delaware Valley both as Executive Director and staff lawyer.

The submission of comments to regulations is a means of communication with government available to any person. An attorney is not required to approve or to sign the comments. Comments are usually technical or policy-oriented, rather than legal, in nature. That Lanard had a law degree does not permit him to claim legal fees for performing what was essentially a client's function in a non-adversary public forum. Because commenting on regulations does not require legal work and is open to the general public, it would be an inappropriate expenditure of public funds to permit a person wishing to comment on regulations who is an attorney or who hires an attorney to bill for those attorney's fees.

Thus, attorney's fees should not be allowed for participating in the administrative proceedings because such proceedings are not civil actions and fees therefor are not provided by statute. Any judicial review of EPA action on the SIP, which might have resulted in a fee award, had to be conducted in the Court of Appeals for the Third Circuit, but no such review was ever sought by Delaware Valley. Providing comments at a public hearing and submitting comments to draft regulations are two activities which are open to the general public. If attorney's fees were permitted for these activities, any

person who desired to provide comments at a public hearing or to draft regulations could simply engage an attorney and then seek attorney's fees from public funds. The Congress never intended such widespread public funding of attorneys in the Clean Air Act.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the award of any multiplier and the award of attorney's fees for submitting comments to draft regulations and for participating at a public hearing on the State Implementation Plan. Petitioners further request this Court to rule that likelihood of success cannot be used as a factor in increasing the basic fee award.

Respectfully submitted,

JAY C. WALDMAN
General Counsel

HENRY G. BARR
Executive Deputy
General Counsel

SPENCER A. MANTHORPE
Chief Counsel
Department of Transportation

JOHN M. HRUBOVCAK
Assistant Counsel
Department of Transportation

JOHN P. KRILL
Deputy General Counsel
(Counsel of Record)
Attorneys for Petitioners

Office of General Counsel
Commonwealth of Pennsylvania
Post Office Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

RESPONDENT'S

BRIEF

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No. 85-5 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1985

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

KAREN L. FLORINI
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

52 pp

QUESTIONS PRESENTED

1. Whether a presumptively reasonable attorneys' fee award under Section 304(d) of the Clean Air Act, 42 U.S.C. 7604(d), may be "multiplied" to reflect the risk that plaintiffs might not have prevailed and, therefore, might have obtained no attorneys' fees at all.

2. Whether the lower courts in this case erred by enhancing a presumptively reasonable attorneys' fee to reflect the high quality of representation rendered by respondent's counsel.

3. Whether Section 304(d) of the Clean Air Act authorizes attorneys' fee awards for time spent commenting on state and federal regulatory proposals.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption of this case, the Secretary of the Pennsylvania Department of Transportation and the Secretary of the Pennsylvania Department of Environmental Resources were named as defendants in the district court and are petitioners in this Court. The United States of America was a plaintiff in the district court and is a respondent in this Court. See Rule 19.6 of the Rules of this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-5

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 46a-70a) is reported at 762 F.2d 272. The opinion of the district court (Pet. App. 1a-45a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1985. The petition for a writ of certiorari was filed on July 3, 1985, and was granted on October 7, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 304(d) of the Clean Air Act. 42 U.S.C. 7604 (d), provides in pertinent part as follows:

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

STATEMENT

1. Petitioners challenge certain aspects of an award of attorneys' fees granted to respondent Delaware Valley Citizens' Council for Clean Air (Delaware Valley). The attorneys' fees in question were awarded for work performed by Delaware Valley's counsel between 1979 and 1983 in connection with the enforcement of a 1978 federal court consent decree. That decree was in settlement of consolidated lawsuits brought by Delaware Valley and the United States to require petitioners to meet their obligations under the Clean Air Act, 42 U.S.C. 7401 *et seq.* Pursuant to the Act, the Pennsylvania Department of Environmental Resources (Penn DER) submitted to the United States Environmental Protection Agency a plan for attaining federal air quality standards. As modified and approved by EPA, Penn DER's plan provided for the development of a program to inspect and maintain automobile emission-control systems (the I/M program). The I/M program was designed to meet carbon monoxide and ozone standards in metropolitan Philadelphia and southwestern Pennsylvania, and it was to be implemented by May 1, 1975. Pet. App. 2a. Both Delaware Valley and the United States filed suit against petitioners when they failed to implement the I/M program; the two suits were later consolidated. *Ibid.*[1]

[1] Originally, Delaware Valley sued both petitioners and EPA, the latter for failing to enforce petitioners' obligations under the Clean Air Act. Thereafter, the United States initiated its own action against petitioners. EPA was then dismissed as a defendant in Delaware Valley's suit, and the two actions against petitioners were consolidated. Pet. App. 2a.

On August 29, 1978, petitioners—the Commonwealth of Pennsylvania and two of its executive agencies, the Department of Transportation (Penn DOT) and Penn DER—signed a consent decree terminating the litigation. Petitioners agreed to implement an I/M program by August 1, 1980, using one of two approaches specified in the consent decree. The decree provided that Penn DOT would seek legislation authorizing that agency to enter into contracts with garage owners to establish inspection stations. If such legislation were not enacted, however, Penn DOT would issue regulations under which privately-owned garages would be certified as inspection stations.[2] Finally, the decree provided for payment to Delaware Valley of attorneys' fees and costs incurred to that date; the total fee award was $38,700, with $30,000 to be paid by petitioners and $8,700 to be paid by EPA to account for the time during which EPA was a defendant in Delaware Valley's lawsuit (see note 1, *supra*). Pet. App. 2a-3a.

2. Unfortunately, implementation of the I/M program did not proceed as specified in the consent decree. In March 1980, the district court approved a modification to the decree, as requested by petitioners and agreed to by Delaware Valley and the United States, delaying implementation of the I/M program until May 1981. Pet. App. 3a. In February 1981, petitioners asked Delaware Valley and the United States to agree to a further postponement of the implementation date, to January 1, 1983. Petitioners sought the second delay to enable them to redraft their not-yet-promulgated regulations identifying

[2] Because the legislation authorizing the contracts system was not passed, Penn DOT later promulgated regulations to establish the alternate system. Pet. App. 3a.

the type of testing equipment that private garages would be required to obtain in order to become certified inspection stations. Specifically, petitioners wanted to require computerized analysis equipment, as had been recommended by EPA for decentralized inspection programs such as Pennsylvania's. However, no manufacturer had yet marketed such equipment or even developed a prototype. *Id.* at 3a-4a.

After extensive negotiations regarding the second request for an extension, the parties reached an impasse. Accordingly, on April 29, 1981, petitioners filed a motion asking the district court to grant the second extension. In response, Delaware Valley filed a contempt motion, based on petitioners' failure to implement the I/M program by May 1, 1981, as required by the modified consent decree. Pet. App. 4a.

On May 20, 1981, the district court denied both Delaware Valley's contempt motion and petitioners' motion for a further extension; instead, the court ordered petitioners to submit a plan for immediate implementation of an I/M program. Such a plan was submitted and approved by the district court. On June 16, 1981, the decree was further modified, and the deadline for implementation of the I/M program was extended to May 1, 1982. Pet. App. 4a. Petitioners appealed the May 20 and June 16 orders, both of which were affirmed by the court of appeals. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 674 F.2d 976 (3d Cir.), cert. denied, 459 U.S. 905 (1982).

During the pendency of that appeal, the Pennsylvania General Assembly enacted a statute, H.B. 456, over the governor's veto, which prohibited the expenditure of state funds for implementation of the I/M program. Act of Oct. 5, 1981, No. 99, 1981 Pa. Legis. Serv. 31 (Purdon). As directed by the state statute, Pennsylvania's executive agencies promptly ceased virtually all activities related to the I/M program. On October 10, 1981, however, Penn DOT did publish final regulations establishing specifications for the emissions analysis equipment to be used in the inspection program. 11 Pa. Bull. 3519 (Oct. 10, 1981). Pet. App. 5a.

On October 12, 1981, petitioners moved to stay implementation of the consent decree in light of H.B. 456. Delaware Valley opposed that motion and again sought contempt penalties. On January 22, 1982, the district court denied petitioners' motion for a stay and held petitioners in civil contempt. As a sanction, the court ordered the United States Secretary of Transportation to refrain from approving any projects or awarding any grants for highways in the two regions covered by the consent decree, except for projects required for purposes of safety, mass transit, or air quality improvement. Pet. App. 5a-6a. The court of appeals upheld the contempt ruling, and this Court declined to grant review. *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 533 F. Supp. 869 (E.D. Pa.), aff'd, 678 F.2d 470 (3d Cir.), cert. denied, 459 U.S. 969 (1982).

Thereafter, the Pennsylvania General Assembly passed legislation authorizing petitioners to proceed with the I/M program; the governor signed that bill into law on May 4, 1983. Subsequently, the parties to the litigation negotiated a new compliance schedule, under which the I/M program would be implemented by June 1, 1984. On May 16, 1983, the district court ratified the new schedule and vacated the contempt sanctions. Pet. App. 6a.

3. Delaware Valley then sought attorneys' fees for the work it had performed between 1979 and 1983 in connection with enforcement of the consent decree. By order dated February 24, 1984, the district court awarded Delaware Valley $216,488.03 in attorneys' fees and costs for this work. Pet. App. 1a-45a.[3] The district court followed

[3] Delaware Valley did not seek fees against the United States for any portion of the post-decree proceedings. The United States therefore has no pecuniary interest in the outcome of this particular case. Because the United States frequently finds itself in the position of a fee-paying defendant, however, the government has a

Delaware Valley's suggested approach of dividing the post-decree litigation into nine "phases," and the court separately calculated the fee award for each phase. Although petitioners raised numerous objections to Delaware Valley's fee request, we confine our discussion of the district court's decision to the issues that petitioners raise in this Court.

a. For the most part, the hours for which Delaware Valley sought compensation were expended on the post-decree litigation itself. In two instances, however, petitioners objected that Delaware Valley was seeking compensation for its participation in state and federal administrative proceedings. Phase II of the post-decree proceedings consisted of time spent by Delaware Valley "monitor[ing] [petitioners'] performance under the consent decree and submitt[ing] comments on the regulations which were published in the Pennsylvania Bulletin" (Pet. App. 17a). The district court rejected petitioners' contention that time spent commenting on the state's proposed regulations was not compensable (*ibid.*):

> While it is true that the opportunity to submit comments to the proposed regulations was available to any person, * * * [Delaware Valley] had an interest in the regulations since [it was] a party to the consent decree. [Its] interest was based on a desire to ensure compliance with the consent decree and to protect [its] rights thereunder. The usefulness of [Delaware Valley's] comments was manifested in the revisions that were made to the original proposed regulations.

Phase IX of Delaware Valley's post-decree activities consisted of work performed "in regulatory actions, such activities not directly required by [the district] court's Orders" (Pet. App. 34a). Specifically, Delaware Valley "participated in EPA hearings during which: 1) [petitioners] requested that EPA modify the state implementation plan (SIP) so that the I/M program would cover a smaller geographic area; and 2) proposals of cut-offs of EPA funding were discussed" (*id.* at 36a). The district court reasoned that the first item was compensable but the second was not (*ibid.*):

> The activities which occurred due to [petitioners'] request for a modification of the I/M program were related to this litigation since an EPA modification of the I/M program would have affected [Delaware Valley's] rights under the decree. For these activities [Delaware Valley] will be compensated. However, participation in hearings concerning the possibility that EPA would cut-off federal grants to Pennsylvania was activity which was not sufficiently related to this litigation since any such EPA decision would not have affected [Delaware Valley's] rights under the decree. Therefore the hours spent on this latter activity will be denied.

b. Petitioners' other major objection to the district court's fee award was their opposition to Delaware Valley's request that the "lodestar" fee for certain phases of the post-decree litigation be increased by the use of upward adjustments, or "multipliers." Specifically, Delaware Valley sought a multiplier of two for Phases IV and V and a multiplier of three for Phase VII. Pet. App. 38a.[4] The

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substantial programmatic interest in the legal issues presented by petitioners.

[4] Phase IV covered Delaware Valley's motion for contempt based on petitioners' failure to meet the May 1, 1981 implementation deadline and Delaware Valley's concomitant opposition to petitioners' request for a further extension. Pet. App. 20a-22a & n.6. Phase V involved Delaware Valley's motion to have petitioners held in contempt following enactment by the state legislature of H.B. 456, the statute that prohibited petitioners from spending any funds to implement the I/M program. Pet. App. 25a-27a & n.7. Phase VII involved Delaware Valley's "monitoring of the contempt sanction" and its opposition to petitioners' attempt to have certain highway projects certified as exempt from the district court's freeze on federal highway funding. *Id.* at 32a.

We note that the district court's opinion contains a clerical error, stating (Pet. App. 38a) that Delaware Valley sought a multiplier

district court, which rendered its decision prior to this Court's decision in *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), did enhance Delaware Valley's "lodestar" fee through the use of multipliers, but neither the size of the multipliers nor the phases of the litigation for which they were awarded coincided with Delaware Valley's request. Thus, the district court awarded a multiplier of four for Phase V, even though Delaware Valley had requested only a multiplier of two, and the court awarded a multiplier of two for Phase VII, as to which Delaware Valley had sought a multiplier of three. Pet. App. 39a-40a. The district court did acquiesce in Delaware Valley's request for a multiplier of two for Phase IV. *Ibid.* The court did not explain the reasons for the two discrepancies between the request and the award.

The district court's entire analysis of multipliers consisted of three paragraphs (Pet. App. 39a-40a). The court recited both "the contingent nature of [Delaware Valley's] success" and "[t]he quality of [Delaware Valley's] work" as factors justifying the award of multipliers (*id.* at 39a). Although the district court's opinion is somewhat ambiguous, it appears that the two-fold multipliers awarded for Phases IV and VII were based solely on the risk of nonsuccess, while the fourfold multiplier awarded for Phase V was based both on the risk of nonsuccess and the quality of Delaware Valley's work.

c. The court of appeals affirmed the district court's award of attorneys' fees and costs in its entirety (Pet. App. 46a-70a). The court affirmed the award of fees for time spent commenting on petitioners' proposed regulations for the reasons stated by the district court (*id.* at 55a). As for the time devoted to EPA's regulatory proceedings, the court of appeals agreed that a fee award was proper "because adoption of the state plan modification would have impaired the rights won by [Delaware

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for Phase VI (which it did not) and suggesting, by negative implication, that no multiplier was requested for Phase IV, when in fact Delaware Valley sought a multiplier of two for that phase.

Valley] in the consent decree" (*id.* at 57a). The court took note (*id.* at 57a n.7) of this Court's decision in *Webb* v. *County Bd. of Educ.*, No. 83-1360 (Apr. 17, 1985), in which the Court suggested in dicta that time spent on administrative proceedings may be compensable under 42 U.S.C. 1988 if the work was "both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement" (*Webb*, slip op. 9). The court of appeals concluded that the administrative work in this case was "useful and necessary for securing full enforcement of the decree" (Pet. App. 57a n.7).

With respect to the use of multipliers, the court of appeals concluded that "this was 'the rare case where the fee applicant offer[ed] specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" Pet. App. 64a (quoting *Blum*, slip op. 11-12). The court also approved the use of "contingency" multipliers to compensate Delaware Valley for the risk of nonsuccess. The court stated (Pet. App. 68a):

> Unlike *Blum*, [Delaware Valley] specifically identified the risks inherent in this litigation in its brief to the district court and, although the Supreme Court considers it an open question whether contingency of success can properly justify a lodestar increase, we have resolved the question in this court. *See Hall v. Borough of Roselle*, 747 F.2d 838 (3d Cir. 1984); [*Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976) (en banc)].

Judge Becker dissented from the majority's affirmance of the district court's award of multipliers (Pet. App. 69a-70a n.12). Judge Becker was of the view that the risk of not prevailing in Phases IV and VII was "simply insufficient to justify the very substantial multipliers awarded by the district court," because, as to those two

phases, petitioners "had to meet an extremely heavy burden to gain modification of the consent decree" (*ibid.*). With respect to the four-fold multiplier awarded for Phase V, Judge Becker would have remanded the matter to the district court for reconsideration in light of *Blum*. Judge Becker's views were expressed as follows (Pet. App. 69a-70a n.12):

> Judge Becker acknowledges that *Blum* did not address the question of how high a multiplier the district court may award * * *. Nevertheless, he believes that because the *Blum* court carefully identified the cases in which fees may be awarded and characterized a 50 percent multiplier as "substantial" [*Blum*, slip op. 11], *Blum* suggests that in only the rarest case would a total multiplier in the range of four be permitted. Judge Becker concludes that, even assuming an award of quality and contingency multipliers is appropriate as to phase V, the multipliers must be recalculated because this case was not so very rare as to justify in light of *Blum* the award of this extraordinary multiplier.

SUMMARY OF ARGUMENT

I. In *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), slip op. 10, the Court held that a reasonable number of hours multiplied by a reasonable hourly rate "is presumed to be the reasonable [attorneys'] fee contemplated by [42 U.S.C.] § 1988." Although the Court declined to hold that upward adjustments, or "multipliers," are never permissible (*Blum*, slip op. 10), the Court did severely limit the circumstances under which such adjustments may be made. However, because the record in *Blum* contained no evidence whatever to support the lower courts' award of a 50% multiplier based on the risk of nonsuccess—a "contingency" multiplier—the Court specifically left open the principal question presented in this case—"whether the risk of not being the prevailing party, * * * and therefore not being entitled to an award of

attorney's fees from one's adversary, may ever justify an upward fee adjustment." *Id.* at 13 n.17.

In our submission, at least three separate problems associated with "contingency" multipliers demonstrate that Congress never intended their use in the calculation of "reasonable" attorneys' fee awards under fee-shifting statutes such as Section 1988 or Section 304(d) of the Clean Air Act. First, contingency multipliers improperly compensate nonprevailing parties for their unsuccessful lawsuits, in contravention of Congress's directive, upheld by this Court in cases such as *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), and *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), that fees be awarded only to prevailing parties.

Second, contingency multipliers lead to profoundly anomalous and inequitable results. Because contingency multipliers are set according to the district court's after-the-fact assessment of a plaintiff's chance of success at the outset of the litigation, the net result is that the more questionable a plaintiff's original claim—and hence the greater the likelihood that his attorney might receive no fee at all—the greater the attorney's "contingency" bonus. This system unfairly penalizes the defendant who legitimately relied on apparently meritorious defenses, while allowing the defendant who had virtually no defense whatever to escape liability for any "contingency" bonus. Not only is this compensation system unfair to defendants, but it produces strong economic incentives for plaintiffs to pursue marginal cases in hopes of obtaining a fee bonus. In addition, the actual setting of a contingency multiplier more closely resembles the "Wheel of Fortune" or the Irish Sweepstakes than the calculation of "reasonable" attorneys' fees. Under the current system of contingency compensation, a defendant may be saddled with hundreds of thousands of dollars in additional liability that bears no relationship to the harm actually suffered by the plaintiff or the hours worked by the plaintiff's attorneys.

Third, contingency multipliers substantially duplicate elements of compensation that are already reflected in the "lodestar" fee. When the underlying facts of a case are convoluted or the legal theories are novel or complex, the attorney will spend correspondingly large amounts of time gathering information, conducting discovery, reviewing documents, researching precedents, investigating the legislative history, drafting pleadings and writing briefs to formulate persuasive legal and factual arguments. Thus, the same obstacles that are likely to make it more difficult for the plaintiff to succeed on the merits also substantially increase the amount of time reasonably expended on a case or the hourly rates that a court may reasonably award. In these circumstances, the "lodestar" fee will produce the fully compensatory fee that Congress intended, and any "enhancement" for the risk of nonsuccess will constitute double counting.

These perverse aspects of contingency multipliers cannot be squared with the legislative history of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988, in which Congress established the basic rules applicable to nearly all fee-shifting statutes. In enacting Section 1988, Congress clearly identified the touchstone for determining the amount of a "reasonable" award of attorneys' fees: "[F]ees [should be] adequate to attract competent counsel, but [should] not produce windfalls to attorneys." S. Rep. 94-1011, 94th Cong., 2d Sess. 6 (1976). Clearly, paying an attorney for years of work he never performed—the actual effect of contingency multipliers—strays far beyond the "reasonable" fee needed to attract competent counsel.

With these factors in mind, it is apparent that the multipliers of two and four awarded in this case were improper. Neither of the courts below found that the number of hours for which Delaware Valley's counsel was compensated or the hourly rates they received were insufficient to reflect fully any "risk" they may have assumed. This omission is not surprising, because the

presumed "risk" was in fact virtually nonexistent. Once the consent decree was signed in 1978, Delaware Valley was assured of prevailing in this case. The post-decree litigation, while indeed protracted and oftentimes complex, never seriously threatened to take away Delaware Valley's status as a prevailing party. Particularly in light of the presence of the United States as a plaintiff intent on ensuring petitioners' compliance with the requirements of the Clean Air Act, the "risks" faced by Delaware Valley in the post-decree litigation were never sufficiently substantial to justify the award of contingency multipliers.

Finally, even if one assumes that the use of multipliers was appropriate in this case, the extraordinarily high multipliers actually employed were grossly excessive. The net effect of the two-fold and four-fold multipliers was to compensate Delaware Valley's counsel for more than $124,000 they never earned—*i.e.*, for over 1,700 hours never expended on the case. Under any standard, such an award constitutes a "windfall to attorneys" (S. Rep. 94-1011, *supra*, at 6).

II. The lower courts also erred in awarding multipliers based on the superior quality of Delaware Valley's representation and the "excellent" results obtained. Because the district court did not have the benefit of this Court's decision in *Blum*, it is not surprising that its opinion wholly fails to articulate a sufficient rationale for the use of "quality" multipliers. And the court of appeals' post hoc attempt to apply *Blum* to the inadequate findings of the district court was similarly defective. Delaware Valley simply failed to offer the "specific evidence" necessary to demonstrate that it obtained "excellent" results and that its counsel's services were superior to the quality of representation to be expected from attorneys being compensated at the high hourly rates employed by the district court.

III. The lower courts also erred in awarding Delaware Valley compensation for time spent participating in state

and federal regulatory proceedings. In only one case, *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), has this Court held that a fee-shifting statute authorizes reimbursement for work done at the administrative level. The instant case, however, contains neither of the two factors that supported the result reached in *Carey*. First, the language of Section 304(d) of the Clean Air Act is significantly different from the language of Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). That section authorizes fees for work in "any action *or proceeding*" brought under Title VII. As the Court recognized in *Carey*, 447 U.S. at 61, a "proceeding" is something different from an "action." Section 304(d) of the Clean Air Act, on the other hand, authorizes fees only in connection with "action[s]." The "actions" contemplated by Section 304(d) are *judicial* actions, not administrative proceedings.

Second, it is undisputed that Delaware Valley was under no obligation to participate in the state and federal administrative proceedings. This situation contrasts sharply with that before the Court in *Carey*, in which the enforcement structure of Title VII *required* a potential plaintiff to pursue available state and local remedies before resorting to federal court.

Contrary to the court of appeals' conclusion (Pet. App. 57a n.7), nothing in this Court's recent decision in *Webb* v. *County Bd. of Educ.*, No. 83-1360 (Apr. 17, 1985), calls for a different result. To begin with, the Court in *Webb* was construing 42 U.S.C. 1988, which, like Section 706(k) of the Civil Rights Act, expressly refers to "proceeding[s]" as well as "action[s]." Furthermore, the most that can be said of *Webb*, in which the Court *rejected* a fee applicant's claim for reimbursement for administrative work, is that work that is "both useful and of a type ordinarily necessary" to advance the litigation (*Webb*, slip op. 9) is a necessary but not sufficient condition for a fee award. Here, the work done by Delaware Valley at the administrative level, while perhaps "useful,"

was not "of a type ordinarily necessary" to protect its rights under the consent decree, because at all times the district court retained jurisdiction to ensure the integrity of the decree.

ARGUMENT

I. THE RISK OF FAILING TO PREVAIL IN LITIGATION DOES NOT JUSTIFY AN UPWARD ADJUSTMENT OF STATUTORILY AWARDED ATTORNEYS' FEES

In *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), slip op. 10, the Court held that a reasonable number of hours multiplied by a reasonable hourly rate "is presumed to be the reasonable [attorneys'] fee contemplated by [42 U.S.C.] § 1988."[5] Although the Court declined to hold that upward adjustments, or "multipliers," are never permissible (*Blum*, slip op. 10), the Court did severely limit the circumstances under which such adjustments may be made. Thus, the Court held that "[n]either complexity nor novelty of the issues * * * is an appropriate factor in determining whether to increase the basic fee award," because those factors should be reflected in the reasonable number of billable hours and the hourly rates (*id.* at 11). Similarly, the Court held that "acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee"; therefore, that factor "normally should not provide an independent basis for increasing the fee award" (*id.* at 13 (footnote omitted)). Finally, the Court held that the number of persons benefited is not a relevant consideration in setting the fee award, because, "[p]resumably, counsel will spend as much time and will be as

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[5] Although the Court in *Blum* was addressing an attorneys' fee award made in a civil rights action pursuant to 42 U.S.C. 1988, similar attorneys' fee provisions, including Section 304(d) of the Clean Air Act, that authorize the award of "reasonable" fees "should be interpreted *pari passu*." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 691 (1983).

diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual." *Id.* at 13 n.16.

With respect to the "quality of representation," the Court held that superior legal work generally is reflected in the reasonable hourly rate. *Blum*, slip op. 11. Thus, the Court concluded that this factor may be used to justify an upward adjustment to the lodestar "only in the rare case." *Ibid.* Moreover, the Court limited such an adjustment to instances (*id.* at 11-12 (emphasis added))

> where the fee applicant offers *specific evidence* to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional."

The Court expressly left open the principal issue here presented: "whether the risk of not being the prevailing party, * * * and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment." *Blum*, slip op. 13 n.17.[6] The court of appeals acknowledged that this Court had never held that "contingency of success can properly justify a lodestar increase" (Pet. App. 68a), but it stated that "we have resolved the question in this court" (*ibid.*). The court then proceeded to uphold the use of contingency multipliers that had the effect of increasing petitioners' liability by more than $124,000.

Although the courts below failed to articulate any rationale underlying the use of "contingency" multipliers in this case, courts and commentators have traditionally viewed such multipliers as compensating the attorney

[6] Such multipliers have come to be known as "contingency" multipliers. As the District of Columbia Circuit acknowledged in *Copeland* v. *Marshall*, 641 F.2d 880, 893 (1980) (en banc), however, contingency adjustments designed solely to compensate for the possibility at the outset that litigation will be unsuccessful and that no fee will be obtained "are entirely unrelated to the 'contingent fee' arrangements that are typical in plaintiffs' tort representation."

for bearing an appreciable risk of nonpayment as a result of lack of success on the merits. Under this view, because the lodestar is calculated on the basis of a reasonable hourly rate for noncontingent litigation (*i.e.*, that in which the attorney is paid regardless of outcome), in some cases additional compensation is thought to be necessary in order to induce attorneys to take on a case in which there is a chance they will receive no fee. See, *e.g.*, *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) (*Lindy I*) (quoting *Cherner* v. *Transition Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963)) (" 'No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.' "); *Copeland* v. *Marshall*, 641 F.2d 880, 893, (D.C. Cir. 1980) (en banc) ("It is important to recognize that the contingency adjustment is designed solely to compensate for the possibility at the outset that the litigation would be unsuccessful and that no fee would be obtained."); *Jones* v. *Diamond*, 636 F.2d 1364, 1382 (5th Cir.), cert. granted *sub nom. Ledbetter* v. *Jones*, 452 U.S. 959, dismissed by agreement, 453 U.S. 950 (1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result."); Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 324-326 (1977).

This rationale may be appealing in the context of actions such as *Lindy I*, in which the fee award comes out of a "common fund" generated by the plaintiff's suit,[7]

[7] The "common fund" doctrine is a judge-made exception to the American Rule against fee-shifting that authorizes a court to permit a party who "preserv[es] or recover[s] a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from

but it is of dubious validity in the context of fee-shifting statutes that make the defendant directly liable for the plaintiff's fees. In the latter situation, three separate factors demonstrate that Congress could not have intended the use of contingency multipliers in calculating reasonable attorneys' fee awards under fee-shifting statutes such as Section 304(d) of the Clean Air Act: first, the impropriety of awarding fees that indirectly compensate nonprevailing parties for unsuccessful suits; second, the fundamental unfairness of imposing a higher fee on certain defendants merely because the strength of the case against them was initially dubious; and third, the degree to which such multipliers reflect improper double billing.

A. Contingency Multipliers Improperly Compensate Nonprevailing Parties.

The award of a substantial contingency multiplier in effect compensates a prevailing party for the risk that he might have lost the case and, thus, cross-subsidizes other parties (or, more aptly, their counsel) for unsuccessful litigation. For example, if the chance of success in a particular case in which a party actually prevails were adjudged (with hindsight) to have been 50% at the time the complaint was filed, a risk multiplier of two might be employed.[8] Assuming the risk assessment were accurate,

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the other parties enjoying the benefit." *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 257 (1975) (footnote omitted); see also *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980); *Trustees* v. *Greenough*, 105 U.S. 527, 533 (1882).

[8] As one commentator has noted, "[i]n theory, there should be no upper limit to this process: when the chance of success was one in fifty, the fee should be multiplied by fifty, and so forth." Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 481-482 (1981). The courts, however, have balked at carrying the theory to its logical extremes. Professor Leubsdorf notes that "[t]he highest any court appears to have gone in setting a contingency multiplier is four." *Id.* at 482 n.48. At least as to one phase of the instant litigation, the lower courts tied this record (Pet. App. 39a-40a).

it could be expected that counsel would succeed in one out of every two similar cases filed. The effect of doubling counsel's fee recovery for prevailing in the first case is indistinguishable from paying for the time counsel devotes to its hypothetical unsuccessful twin.[9] This compensation for unsuccessful litigation is contrary to the intent of Congress and, in the case of governmental entities, improperly expands Congress's limited waiver of sovereign immunity. See note 17, *infra*.

Several courts have acknowledged that contingency awards compensate attorneys not only for their successful efforts, but for their unsuccessful efforts as well. As the court stated in *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978) (emphasis added):

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[9] *Laffey* v. *Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), aff'd in part and remanded in part, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, No. 84-1655 (June 17, 1985), offers a concrete illustration. In that case, the district court found that plaintiffs' counsel had reasonably expended in excess of 11,000 hours pursuing a sex discrimination claim. 572 F. Supp. at 371. This led to a "lodestar" attorneys' fee of approximately $1.48 million. *Id.* at 388. The district court then approved a "risk premium" of 100%, after determining that plaintiffs' chances of prevailing were approximately 50% when the case was filed. *Id.* at 378-380, 388. By doubling the attorneys' fee award to account for this contingency factor, the district court compensated plaintiffs' counsel for the equivalent of more than five years of attorneys' time spent on unsuccessful cases.

The District of Columbia Circuit reversed this award of a "crude multiplier * * *" as contrary to the congressional scheme" of compensating only prevailing parties. *Laffey*, 746 F.2d at 27-28. The court of appeals also held that plaintiffs were not entitled to a more "sophisticated" contingency "enhancement" to reflect the uncertainty of prevailing (and hence receiving payment). Noting that *Blum* cast some doubt on the propriety of *any* contingency adjustments, the court of appeals concluded that, in any event, the case before it was not so exceptional as to warrant such an adjustment to the lodestar. *Laffey*, 746 F.2d at 28-29.

> From the attorneys' standpoint, the contingent fee insures that counsel are compensated not only for their successful efforts but also for unsuccessful litigation. Its use allows attorneys—including attorneys who could not otherwise absorb the costs of lost cases—to take the financial gamble of representing penurious clients, since, over the long run, *substantial fees awards in successful cases will provide full and fair compensation for all legal services rendered to all clients.*

For precisely this reason, however, other courts have disapproved of contingency multipliers. See, *e.g.*, *McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984) ("The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful * * * suits, even though the attorneys' fee statute is expressly limited to cases where the party seeking the fee prevails."); *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4, 27 (D.C. Cir. 1984), cert. denied, No. 84-1655 (June 17, 1985) ("To multiply all awards to account for the risk of losing would ultimately generate a pool of legal fees sufficient to compensate all attorneys bringing all civil rights suits; the fund generated would differ from insurance only in the manner in which it was collected and distributed."); *Murray* v. *Weinberger*, 741 F.2d 1423, 1431 (D.C. Cir. 1984) ("Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorney's fees is not unlike compensating an attorney for unsuccessful claims; it hedges the * * * requirement that only prevailing parties may recover attorney's fees.").

The rationale for contingency multipliers as expressed in *Stanford Daily* is thus inconsistent with the Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424, 435-436 (1983), holding that the extent of a plaintiff's success is the most critical factor in determining the proper amount of an attorney's fee award under 42 U.S.C. 1988. See

Laffey, 746 F.2d at 27; *Murray*, 741 F.2d at 1431. If, as the Court held in *Hensley*, Congress did not intend to saddle a losing defendant with attorneys' fees incurred by a partially successful plaintiff in the pursuit of discrete claims on which the plaintiff did not prevail (461 U.S. at 434-436), then it makes no sense at all to require a defendant to pay (indirectly) the attorneys' fees of a totally unrelated plaintiff whom neither the defendant nor anyone else has harmed in any way and, indeed, with whom the defendant has no connection whatever.

In addition to the conflict with *Hensley*, the rationale for contingency multipliers cannot be squared with the Court's explicit prohibition of attorneys' fee awards under the Clean Air Act to nonprevailing parties. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 691-692 (1983) (construing Section 307 of the Clean Air Act and noting that the same construction governs Section 304). Thus, contingency multipliers of the sort approved by the lower courts in this case violate the will of Congress by indirectly compensating attorneys for unsuccessful actions and losing legal theories. See pages 28-32, *infra*.

B. Contingency Multipliers Are Contrary To Basic Notions Of Fairness And Lead To Anomalous Results.

Contingency multipliers are governed by a profoundly perverse rule: the more reasonable a defendant's decision to defend its actions in court, the larger its exposure for fees should the plaintiff finally prevail.[10] This irrational system unfairly penalizes with a higher payment of fees the defendant who legitimately relies on an apparently

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[10] For example, in *Laffey* v. *Northwest Airlines*, *supra*, the district court's estimate that the plaintiffs' chances of prevailing were 50% could be viewed as a determination that, at the outset, the defendant's case appeared to be just as strong as the plaintiffs' case. Yet, by doubling the fee award, the district court effectively penalized the defendant $1.48 million for failing to concede the case. This anomaly did not escape the attention of the court of appeals. See *Laffey*, 746 F.2d at 26.

meritorious defense or who vigorously defends against a seemingly baseless claim. As one commentator has explained (Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 488-489 (1981) (footnotes omitted)):

> [T]he defendant must pay more when the balance of precedent and evidence was relatively favorable to him. On the other hand, when the plaintiff was certain of success because the defendant's position was hopeless or frivolous, the defendant pays no contingency bonus. Furthermore, the contingency bonus is extracted from that defendant in order to reward the plaintiff's bar for bringing similar but unsuccessful suits against other defendants. If such litigation is to be subsidized, one may well ask why the subsidy should come from the defendant in another case.

See also *McKinnon*, 750 F.2d at 1392; *Laffey*, 746 F.2d at 26; Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 375 (1980).

Moreover, contingency multipliers produce an economic incentive for plaintiffs to pursue nonmeritorious cases in hopes of a fee bonus.[11] Approval of contingency

[11] Not surprisingly, there is evidence to suggest that Congress never intended fee-shifting statutes to produce such counter-intuitive incentives. During the House hearings on the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988, Representative Seiberling remarked:

> Mr. Chairman, since these hearings do concern circumstances under which it would be appropriate to make one side in a lawsuit pay for the legal expenses of the other side, some people may conclude that the hearings are intended to promote the special interests of lawyers. Perhaps that is so to the extent *it promotes the interests of successful lawyers who make the right judgments or who handle a case properly so that they win.*
>
> But it certainly is *not calculated to promote the interests of lawyers who make the wrong judgment* * * *.

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multipliers thus encourages marginal litigation that further congests the already overcrowded federal court dockets. "If the capacity of the judicial system remained constant, these marginal claims would displace civil rights cases with a greater probability of success. The net effect would be a dilution in the deterrent force of the civil rights statutes." *Laffey*, 746 F.2d at 27.[12] The same observation holds true for the meritorious environmental cases that Congress intended to encourage through the enactment of Section 304(d) of the Clean Air Act. Absent strong evidence that Congress authorized contingency bonuses, these deleterious effects counsel strongly against their use.[13]

House Comm. on the Judiciary, 94th Cong., 1st Sess. 8 (1975) (emphasis added). See also *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 692-693 & n.13 (citation omitted) ("central purpose" of Section 304(d) was to "check the 'multiplicity of [potentially meritless] suits' ").

[12] In this regard, the total irrationality of the contingency multiplier was graphically explained by the Seventh Circuit in *McKinnon*, 750 F.2d at 1392:

> [I]f the logic of the risk multiplier were applied consistently, the attorney's fee would be larger the riskier the case, even though this would mean rewarding lawyers for flooding the courts with unmeritorious litigation, something we very much do not need. Imagine a class of cases where only one in 50 plaintiffs prevails. Then the risk multiplier would be 50, and a lawyer who brought all 50 cases and lost 49 would receive the same compensation that he would have received had he been certain to win all 50 cases (in which event there would have been no multiplier), rather than (virtually) certain to lose 98 percent of them.

[13] In fact, Congress was quite concerned that Section 304(d) of the Clean Air Act not generate needless litigation (S. Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970) (emphasis added)):

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action

Finally, the method employed in calculating contingency multipliers is totally arbitrary and standardless. Under the guise of a pseudo-scientific approach that requires a court to estimate, after the plaintiff actually has prevailed, the likelihood of success at the outset of the litigation (*Copeland* v. *Marshall*, 641 F.2d at 893), district courts in fact wind up subjecting themselves and the parties to a process that more closely resembles the "Wheel of Fortune" or the Irish Sweepstakes than the calculation of "reasonable" attorneys' fees. Yet the outcome of this irrational and wholly subjective exercise may add hundreds of thousands of dollars to a defendant's fee liability, and the ultimate award may bear no relationship to the harm suffered by the plaintiff or the work performed by his attorney. Cf. *City of Riverside* v. *Santos Rivera*, No. A-122 (Aug. 28, 1985) (Rehnquist, Circuit Justice). As one commentator has recognized, district courts face nearly insurmountable obstacles in determining what the chance of success was at the outset of a lawsuit (Leudsdorf, *supra*, 90 Yale L.J. at 486-487 (footnote omitted)):

> When we deal with the probability of winning a single litigation * * *, we must speculate about retrials of the same case before different judges and jurors, or imagine well-informed gamblers betting on the outcome of the case. * * *
>
> Yet once the result is known, it is hard for judges and lawyers to regain a perspective of ignorance and to treat the result as only one of several that were initially possible. * * *
>
> For a court that has already upheld the plaintiff's case to assess how likely it was to do so raises problems of propriety as well as practicality. In effect, the court is being asked to decide how likely it was to reach what is now recognized as the right result. One may question whether a judge should be called upon to look for the dust swept under the same rug on which he is standing.

For all these reasons, it is highly doubtful that the risk factor can contribute to determining "reasonable" attorneys' fees with any degree of accuracy, objectivity, or consistency.[41] Certainly, the result in this case, in which the multiplier accounts for more than half of the total attorneys' fee award, demonstrates that something is seriously wrong with the current system of compensation.

C. Contingency Multipliers Provide Improper Double Compensation.

Use of a contingency multiplier is particularly objectionable because it substantially duplicates compensation for elements that either are already reflected in the lodestar or are not compensable at all. The contingency multiplier essentially seeks to compensate the plaintiff for assuming the risk of not prevailing—and of thus receiving no fee award.[15] That risk basically has two components:

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is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the time time *encouraging the quality of the actions that will be brought.*

[14] *Beazer* v. *New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977), rev'd, 440 U.S. 568 (1979), nicely illustrates the difficulties district courts face in assessing the plaintiff's initial chances of success. A unanimous panel of the Second Circuit was so confident that the legal issues presented in *Beazer* were "relatively simple" that it held the district court's award of a risk bonus to be "an abuse of discretion" (558 F.2d at 100). This Court, however, found the issues somewhat more complex: In three separate opinions covering over 50 pages of the official reporter, a divided Court reversed on the merits.

[15] It goes without saying, of course, that a "contingency" multiplier certainly is inappropriate when the fee agreement between the attorney and client in fact guarantees payment. See *Ramos* v. *Lamm*, 713 F.2d 546, 558 (10th Cir. 1983) (footnote omitted) ("Lawyers who are to be paid whether they win or lose have a weak claim to a multiplier based on the risk of loss.").

first, the risk of bringing an unmeritorious case (*i.e.*, one not actionable on the legal theory presented to the court or one not supported by the facts), and second, the risk of failing to persuade the court in a meritorious case. Given that this Court has determined that Congress did not intend that attorneys' fees be awarded to parties who bring nonmeritorious claims (see pages 20-21, *supra*), it is difficult to perceive why the first component—the mere *risk* of bringing nonmeritorious claims—should be considered properly compensable.

The latter component of the risk—that arising from failure to persuade the court on the merits—is the force driving the attorney's work in preparing his presentation of the case. When the underlying facts are convoluted or the legal theories novel or difficult, counsel will spend correspondingly large amounts of time gathering information, conducting discovery, reviewing documents to develop the factual record, researching precedents, investigating legislative history, drafting pleadings, and writing briefs to formulate persuasive legal and factual arguments. Thus, the same unfavorable facts or unfavorable law that undermine a plaintiff's chance of success also substantially increase the number of hours reasonably expended or lead the court to accept as reasonable a higher hourly rate. In either event, the lodestar fully and accurately compensates plaintiff's counsel for any "risk" that he may have assumed.

Double billing also occurs in more subtle ways. Some element of risk allowance is built into market rates for attorneys' services, which necessarily cover hours for which the lawyer for one reason or another does not receive payment directly from the client. See *Copeland* v. *Marshall*, 641 F.2d at 917-919 (Wilkey, J., dissenting).[16]

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[16] As Judge Wilkey observed in *Copeland*, 641 F.2d at 918-919 (emphasis in original):

> What our colleagues [in the majority] fail to realize is that the "market value" fee they have taken as a "lodestar," the starting point to be adjusted for contingencies, *already has a substantial contingency factor built into the fee.*
>
> * * * * *
>
> Since the "market value" fee in commercial private practice already includes the contingency of failure and receipt of a lower fee than otherwise obtainable, our colleagues [in the majority] create a danger of duplication when they add this contingency factor to the already generous market value regular hourly rate.

Judge Wilkey further pointed out (641 F.2d at 919) that the majority in *Copeland* recognized the same point (641 F.2d at 893): "To the extent, of course, that an hourly rate underlying the 'lodestar' fee itself comprehends an allowance for the contingent nature of the availability of fees * * *, no further adjustment duplicating that allowance will be made." Thus, Judge Wilkey parted company with the majority only to the extent that he was of the view that market billing practices almost always include an allowance for "contingency," whereas the majority proposed to leave that determination to case-by-case evaluation. Compare 641 F.2d at 893 with 641 F.2d at 919 (Wilkey, J., dissenting). There was no dispute, however, over the proposition that the contingency factor already built into market rates may not be further enhanced by a separate "contingency multiplier."

Similarly, as the district court observed in *Stanford Daily* v. *Zurcher*, 64 F.R.D. at 682, "the contingent nature of success and the quality of the attorneys' work * * * oftentimes will be interrelated. For example, an increase in the attorneys' fees because the chances of success (and for fees) at the beginning of litigation appeared slight is implicitly if not explicitly an increase due to the high caliber of the attorneys' representation." But that quality factor should be fully and fairly reflected in the hourly rate applied to determine the compensatory fee award. Moreover, the Court has limited fee award adjustments for the quality of representation to "the rare case" in which the fee applicant offers specific evidence to demonstrate that the superior service is not reflected in the hourly rate charged and "the success [obtained] was 'exceptional.'" *Blum*, slip op. 11-12. Accordingly, if the Court finds that contingency multipliers are ever

appropriate, they must be limited to the rarest of circumstances. Any other result would permit an attorney to secure indirectly that which was rejected in *Blum*—the routine award of a bonus for the high quality of representation, needed only to overcome the apparent weaknesses in his case.

D. Contingency Multipliers Are Contrary To The Intent Of Congress.

As we have explained in the preceding sections of this brief, contingency multipliers impermissibly compensate nonprevailing parties, produce perverse incentives that generate needless litigation, raise profound issues of fairness, and lead to unearned windfalls for attorneys based on totally arbitrary considerations. In light of these serious problems, the Court should not interpret the phrase "reasonable attorney * * * fees" to incorporate contingency multipliers without a clear indication that Congress so intended. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 686 (legislative history of the Clean Air Act does not suggest "that Congress meant to abandon historic fee-shifting principles and intuitive notions of fairness"). Congressional approval of contingency multipliers is, however, conspicuously absent.[17]

[17] The absence of express congressional authorization for contingency multipliers is particularly important where, as here, the fee-paying defendant is a governmental entity. As this Court recently reaffirmed in the case of the federal government, fee-shifting statutes represent a limited waiver of sovereign immunity. *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 685-686. Waivers of immunity must be strictly construed and may not be "enlarge[d] * * * beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Accordingly, in determining whether a "reasonable" attorneys' fee award may properly include a contingency multiplier, the Court should be guided by the language of the statute and by what Congress "clearly and unequivocally" intended. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981). By virtue of the Eleventh Amendment, the same rule of strict construction holds true in cases such as this one, where a state is the fee-paying defendant. Cf. *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 7-11.

Fee-shifting statutes reflect Congress's express determination that, in specific limited circumstances, a departure from the traditional "American Rule" that each party bear its own attorneys' fees regardless of the outcome of the litigation is warranted to encourage citizens to act as "private attorneys general" to vindicate important public rights. See, *e.g.*, S. Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970). Although Congress sought to ensure that attorneys would be fairly compensated for certain "public interest" litigation, nowhere has Congress evinced a desire to replicate every aspect of private fee agreements. Such agreements typically provide either that the attorney is entitled to payment at an hourly rate regardless of outcome or that the attorney will receive some portion of the monetary judgment awarded to the client. Neither scenario remotely parallels the workings of the fee awards made pursuant to fee-shifting statutes, under which defendants directly pay their opponents' attorneys' fees.

Nothing in the Clean Air Act or its legislative history speaks to the size of a "reasonable" attorneys' fee award. Congress has, however, briefly addressed that issue in enacting the attorneys' fee provision of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988.[18]

[18] We agree with the court of appeals' statement that "the jurisprudence regarding the calculation of reasonable attorneys' fees developed in connection with other attorneys' fee statutes—particularly § 1988—is applicable to cases brought pursuant to § 304(d)" of the Clean Air Act. Pet. App. 52a. Because Section 1988 and Section 304(d) of the Clean Air Act share a common purpose—to enable private citizens to aid in the enforcement of important public rights—we also believe that Section 1988's legislative history is relevant to a proper determination of what constitutes "reasonable" attorneys' fees under Section 304(d). It should be noted, however, that neither the case law interpreting Section 1988 nor its legislative history is transferable to the Equal Access to Justice Act, 28 U.S.C. 2412(d). Among other reasons, EAJA, unlike Section 1988, contains an express fee cap of $75 per hour (28 U.S.C. 2412(d)(2)(A)(ii)), thus making the use of multipliers—whether

There, Congress clearly identified the touchstone for determining the amount of a "reasonable" award of attorneys' fees: "[F]ees [should be] adequate to attract competent counsel, but [should] not produce windfalls to attorneys." S. Rep. 94-1011, 94th Cong., 2d Sess. 6 (1976). See also H.R. Rep. 94-1558, 94th Cong., 2d Sess. 9 (1976) (fee awards should be sufficient "to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys"). The committee reports cited *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), as listing the factors to be considered in fixing a fee award.[19] H.R. Rep. 94-1558, *supra*, at 8: S. Rep. 94-1011, *supra*, at 6. In addition, the Senate Report cited three district court decisions said to "correctly appl[y]" the *Johnson* standards in fixing a fee award. *Ibid.*; see also *Hensley* v. *Eckerhart*, 461 U.S. at 430 & n.4.

A fair reading of *Johnson* and the three cases cited in the Senate Report does not support the conclusion that Congress authorized contingency multipliers as an element of "reasonable" attorneys' fees. Admittedly, one of the factors listed in *Johnson* was "[w]hether the fee is fixed or contingent" (488 F.2d at 718). But the Fifth

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to reflect contingency or any other factor—incompatible with Congress's limited waiver of sovereign immunity. See *Underwood* v. *Pierce*, 761 F.2d 1342, 1348 (9th Cir. 1985), petition for reh'g pending.

[19] The factors discussed in *Johnson* are (488 F.2d at 717-719):

(1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; and (12) Awards in similar cases.

Circuit's "original elucidation of this factor in 1974 made clear that it referred to the fee contract between the plaintiff and his lawyer." Leubsdorf, *supra*, 90 Yale L.J. at 479 n.38. At most, therefore, the Fifth Circuit meant only that contingency arrangements should be taken into account in determining the reasonableness of a particular fee award, not that the contingent nature of a fee warrants *enhancement* of a fully compensatory award by application of a multiplier. See *Bonner* v. *Coughlin*, 657 F.2d 931, 936 (7th Cir. 1981) ("The contingent nature of the fee is an appropriate factor to weigh in determining the overall reasonableness of the fee, but it alone does not justify the use of a multiplier.").

An analysis of the three district court cases cited with approval in the Senate Report demonstrates that Congress merely viewed the risk of an attorney's obtaining no compensation as a factor to be considered in assessing the reasonableness of the amount of time expended and the hourly rate requested. In *Davis* v. *County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974), the district court added a "Result Charge" of $7,193.32 to the basic award of $39,868 for "Attorneys' Time" at the "normal hourly rates." The bonus awarded in *Davis* was in no way intended to compensate the lawyers for assuming the risk of nonpayment that might arise out of failure on the merits. Instead, as the label used suggests, the fee was enhanced because the court believed that counsel had "achieved excellent results" and that "[t]he nature of the case made it difficult to litigate" (8 Empl. Prac. Dec. ¶ 9444, at 5048).[20]

In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975), the district court did not award any bonus or multiplier. In fact, the court did not explicitly compute the fee award based upon hours reason-

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[20] Under *Blum*, of course, neither of these factors is sufficient to justify a multiplier; rather, both are subsumed within the "lodestar" calculation. *Blum*, slip op. 11, 13.

ably expended. Instead, the court simply reviewed nine factors, similar to those listed in *Johnson*, and *reduced* the prevailing party's fee request by roughly 15%. The court stated that the amount requested "would be reasonable," but that it "would prefer to err on the conservative side in dealing with any fee question" rather than "contribute unnecessarily to the overpricing of litigation in this or any other court" (66 F.R.D. at 486).

Finally, in *Stanford Daily* v. *Zurcher*, 64 F.R.D. at 688, the district court ruled that "the contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation warrant[ed] increasing the base fees figure (hours worked times average billing rate)" of $37,500 by $10,000.[21] Thus, in approving the approach of the *Stanford Daily* court, Congress did not authorize the mechanical multiplication of the lodestar to compensate attorneys for the risk of receiving no payment. Rather, Congress ratified a process—consistent with the one used in *Johnson*—that evaluates whether the "hours worked" and the "billing rate" accurately reflect not only "the contingent nature of compensation," but also the "quality of the attorneys' work" and the "results obtained." In *Blum*, the Court recognized that the latter two factors are subsumed within a properly calculated "lodestar" fee, and nothing in *Stanford Daily* suggests that the "contingency" factor should be treated any differently.[22]

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[21] Although the district court did not explain how it had translated these factors into the stated dollar amount, it emphasized that the various *Johnson* factors overlap and that "recognition of their overlap [is needed to avoid] unnecessary inflation of the attorneys' fees award" (64 F.R.D. at 682).

[22] It is, of course, perilous to attribute too much weight to the particular circumstances of district court cases mentioned in passing in a legislative report. But it is significant to note that, in the three cases cited by the Senate Report, one lowered the fee award requested by counsel and the other two added bonuses of only 20% or 25%. Accordingly, if the Senate Report is read as approval for the use of contingency multipliers, it clearly conveys Congress's desire that the use of such multipliers not be automatic and that any multiplier component be modest in amount so as to prevent "windfalls to attorneys" (S. Rep. 94-1011, *supra*, at 6).

E. The Award Of A Contingency Multiplier In This Case Was Improper.

For the reasons explained in the preceding sections of this brief, we submit that contingency multipliers should be entirely excluded from the calculation of "reasonable" attorneys' fees. If contingency multipliers are ever appropriate, however, the Court should require at least as strong a showing in favor of their use in a particular case as it requires for the use of "quality" multipliers. As we noted at the outset, *Blum* prohibits the award of "quality" multipliers except in "the rare case" in which the fee applicant offers "specific evidence" to demonstrate that the high caliber of the representation is not reflected in the hourly rates charged. *Blum*, slip op. 11-12. In light of the serious problems associated with contingency multipliers, no lesser showing should be allowed to sustain the award of a risk bonus. Free of a requirement of "specific evidence" to support a contingency multiplier, the district courts would be vested with unbridled discretion to confer a large financial "bounty" on subjectively selected plaintiffs. Here, for example, the district court made no finding that the number of hours compensated or the hourly rates awarded failed to reflect fully the "risk" allegedly assumed by Delaware Valley's counsel. Indeed, the district court's three-paragraph analysis of the multiplier issue does not even clearly identify which portions of the multipliers reflected contingency and which reflected quality of representation. For this reason alone, the district court's award of multipliers was erroneous.

In any event, no contingency multiplier should have been awarded under the facts of this case, because the "risk" of nonpayment was not significant. Throughout these proceedings, Delaware Valley has sought to

enforce a judicially-approved consent decree. Whatever "risk" accompanied the initial filing of this lawsuit was effectively terminated with the signing of the consent decree in 1978. Although petitioners made strenuous efforts to avoid their obligations under that decree, they never claimed that those responsibilities—or the underlying requirements of the Clean Air Act—had been satisfied. While there may, at times, have been doubt that the consent decree *as written* would be implemented, some form of relief was a virtual certainty in light of petitioners' failure to fulfill any portion of their consent decree obligations and their undisputed noncompliance with the Clean Air Act. This conclusion is all the more inescapable in light of the United States' participation as a plaintiff in the litigation; whatever "risks" were associated with the case for Delaware Valley were effectively offset by the federal government's insistence that petitioners bring themselves into compliance with federal air quality standards.[23] Thus, the danger of failing to prevail

[23] Delaware Valley contended in its fee application (J.A. 160a) that the United States "was not always a staunch defender of the Decree, nor of the contempt sanction imposed by the [district court] to coerce the [petitioners] into compliance," thereby suggesting that Delaware Valley alone bore the risks of the litigation. While it is true that the United States at times took a more moderate position than Delaware Valley, it is simply not credible to assert that Delaware Valley did not benefit substantially from the presence of the United States as a plaintiff in this case.

It also bears noting that the United States significantly aided Delaware Valley's cause in other ways. Petitioners submitted the consent decree, the I/M regulations spawned by the decree, and other control measures to EPA for approval as revisions to Pennsylvania's state implementation plan (SIP) for attainment and maintenance of the federal standards for ozone and carbon monoxide. Petitioners also requested an extension of the statutory deadline for attainment of those standards to December 31, 1987. In May 1980, EPA approved the measures and the requested extension. 45 Fed. Reg. 33607. This approval automatically triggered the requirement added to the Clean Air Act in 1977 that SIPs for extension areas contain an I/M program (42 U.S.C. 7502(b)(11)(B)). Thus, petitioners are subject to I/M requirements by statute, wholly apart from the terms of the consent decree. In addition, the Clean Air Act Amendments of 1977, 42 U.S.C. 7401 *et seq.*, added stringent new provisions to deal with the failure of many areas, such as Pittsburgh and Philadelphia, to attain national ambient air quality standards on time. See 42 U.S.C. 7407(d), 7410(a)(2)(I), 7501-7506. Pursuant to these provisions, EPA designated the Philadelphia and Pittsburgh areas as "nonattainment areas" for carbon monoxide and ozone. 43 Fed. Reg. 8962 (1978). That designation remains in effect. 40 C.F.R. 81.339.

in the post-decree proceedings simply was not significant enough to require compensation at a level higher than the lodestar fee. See *Ramos* v. *Lamm*, 713 F.2d 546, 558 (10th Cir. 1983) ("The real controversies and uncertainties lay in litigating the remedy * * *. Thus, some measure of success on the merits was fairly certain, and no bonus for contingency appears warranted."). See also *Beazer* v. *New York City Transit Authority*, 558 F.2d 97, 100-101 (2d Cir. 1977), rev'd on other grounds, 440 U.S. 568 (1979) (despite "complex factual issues," the court eliminated $50,710 risk "premium," because danger of losing case was low due to "relatively simple" legal issues).

Finally, even if some contingency multiplier were appropriate, the district court's award of multipliers of two and four was grossly excessive. As noted above, Congress has cautioned the courts not to award fees that "produce windfalls to attorneys." S. Rep. 94-1011, *supra*, at 6; see also H.R. Rep. 94-1558, *supra*, at 9. Consistent with this direction, if any bonus above the basic fee was to be awarded, it should have been far more modest in size. Instead, the district court utilized extraordinarily high multipliers, see note 8, *supra*, that resulted in payment to Delaware Valley's counsel of more than $124,000 for over 1,700 hours that they never worked on the case.[24]

[24] In our submission, the award of *any* multipliers in this case was erroneous. The use of the *four-fold* multiplier in particular

In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d at 719, the Fifth Circuit warned against the corrosive effects of excessive attorneys' fee awards:

> [C]ourts must remember that they do not have a mandate under [a fee-shifting statute] to make the prevailing counsel rich. Concomitantly, the [statute] should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys * * *.

To appreciate the significance of this reminder, it should be noted that, at about the time the legal services in this case were rendered, the average cost to the taxpayer of the legal services of the United States Department of Justice (including attorneys' salaries, support staff salaries, and other overhead) ranged from $27.48 per hour for a newly hired attorney to $48.28 per hour for the most experienced litigators. See *Copeland* v. *Marshall*, 641 F.2d at 912 n.10 (Wilkey, J., dissenting). The multipliers employed below—in effect compensating Delaware Valley's counsel at rates up to $400 per hour—unquestionably "ridicule the public attorney general" and are inconsistent with the court's obligation to limit fees to the level needed to attract competent counsel and to avoid windfalls to attorneys.

In sum, an award of attorneys' fees computed by applying a reasonable hourly rate to the number of hours reasonably expended upon a successful claim should, by definition, be sufficient to attract competent counsel. Accordingly, absent truly exceptional circumstances, further

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demonstrates that something is seriously amiss. As one commentator has remarked (Leubsdorf, *supra*, 90 Yale L.J. at 487):

> In such a case [of multipliers greater than two], the obvious question is why the plaintiff won at all—and the most obvious answer is that he won because the case was wrongly decided. No one, presumably, would argue that the court should increase the lawyer's fee because he succeeded in winning a case that he should have lost.

enhancement of such an award—particularly enhancement by arbitrary, large multipliers such as the district court chose in this case—results in an improper windfall to the prevailing party's counsel.

II. THE AWARD OF MULTIPLIERS BASED ON THE QUALITY OF REPRESENTATION IN THIS CASE WAS ERRONEOUS

The Court held in *Blum*, slip op. 11-12, that enhancement of a presumptively reasonable fee to account for the high quality of representation is prohibited except in "the rare case" in which "the fee applicant offers specific evidence to show that the quality of service was superior to that one reasonably should expect in light of the hourly rate charged and that the success was 'exceptional.'" To the extent that the multipliers awarded by the district court were intended to compensate for the high quality of Delaware Valley's representation and "excellent" results (but see page 8, *supra*), this case falls far short of *Blum*'s stringent requirements.

We start with the "specific evidence" offered by Delaware Valley. Significantly, in its initial fee application, Delaware Valley expressly disclaimed any entitlement to a "quality" multiplier (see J.A. 80a-81a). This disclaimer clearly encompassed Phase IV of the litigation. Later, Delaware Valley submitted a supplemental fee application, in which it requested quality multipliers for Phases IV, V, and VII (J.A. 162a-168a). Although the work performed in Phase IV obviously had not changed between the time of the initial and supplemental fee applications, Delaware Valley did not even attempt to explain, in its supplemental application, why a quality multiplier for that phase had suddenly become appropriate. As for Phases V and VII, Delaware Valley merely contended that it had borne the laboring oar in the litigation and that the issues "concern[ed] the nature of our federal form of government in the context of cooperative federalism" (J.A. 166a-167a). Clearly, this submission did not

satisfy *Blum*'s requirement for "specific evidence" of the superior quality of Delaware Valley's work, nor did it support a finding of "excellent" results.

The district court then took this inadequate submission and based its award of multipliers on a hodge-podge of undifferentiated, conclusory statements that included factors clearly prohibited by *Blum*. For example, the district court stated (Pet. App. 39a) that the case involved "new and novel issues, the resolution of which had little or no precedent." Compare *Blum*, slip op. 11. The court also noted that the "quality of [Delaware Valley's] work was superior" in Phase V (Pet. App. 39a), but it did not explain how it reached that conclusion, other than to note that Delaware Valley had "helped not only this court but also the court of appeals" (*ibid.*). This was an insufficient justification for a quality increase in a fee already calculated on the basis of "high hourly rate[s]" (*id.* at 25a). Finally, the district court, without any explanation whatever, increased the multiplier requested by Delaware Valley for Phase V from three to four. Clearly, neither Delaware Valley nor the district court came forward with the requisite "specific evidence" to support this award of an additional $27,372.50.

The court of appeals, which had the benefit of this Court's decision in *Blum*, made a more extensive attempt to justify the multipliers than did the district court. Pet. App. 65a-67a. The court of appeals described at some length petitioners' repeated attempts to avoid compliance with the consent decree and explained that these unusual circumstances required Delaware Valley to "walk[ ] the tight, and sometimes imperceptible, line that divides the competencies of two governmental sovereignties" (*id.* at 66a-67a). These considerations, however, do not demonstrate that the work of Delaware Valley's counsel was superior to what one would expect in light of the high hourly rates awarded or that Delaware Valley's success was "exceptional." It was the Supremacy Clause of the Constitution that accounted for the results obtained,

rather than any extraordinary efforts of counsel. Cf. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695-696 (1979).

The courts below did not find that the hourly rates awarded to Delaware Valley's counsel failed adequately to reflect the quality of the services rendered or the results obtained. It is worth emphasizing in this regard that Delaware Valley's lead counsel was, by the court of appeals' own acknowledgment, an "inexperienced attorney[ ]" (Pet. App. 62a n.10), yet the district court chose to compensate him "at a high hourly rate * * * of $100 per hour" (*id.* at 25a; see also *id.* at 29a-30a, 33a). This determination provided ample reward for the quality of the services rendered and made the award of quality multipliers improper under *Blum*.

III. SECTION 304(d) OF THE CLEAN AIR ACT DOES NOT AUTHORIZE COMPENSATION FOR TIME SPENT COMMENTING ON STATE AND FEDERAL REGULATORY PROPOSALS

As previously noted (see pages 6-7, 8-9, *supra*), the courts below approved compensation for the time Delaware Valley spent commenting on Pennsylvania's proposed I/M regulations and participating in EPA administrative proceedings concerning proposed revisions to Pennsylvania's SIP. In our submission, such time is not properly compensable under Section 304(d) of the Clean Air Act.

In only one instance has this Court held that a fee-shifting statute authorizes reimbursement for work performed at the administrative level. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980). That case, however, arose under the attorneys' fee provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). The result reached by the Court turned both on the express language of Section 706(k) and on the special structure of Title VII's enforcement scheme. First, Section 706(k) expressly authorizes fees for work in "any action

or proceeding" under Title VII. The Court held that "Congress' use of the broadly inclusive disjunctive phrase 'action or proceeding' indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings" (447 U.S. at 61). Second, the Court interpreted Title VII as *requiring* resort to state and local remedies before the filing of suit in federal court. 447 U.S. at 65.

More recently, in *Webb* v. *County Bd. of Educ.*, No. 83-1360 (Apr. 17, 1985), the Court affirmed the denial of attorneys' fees under 42 U.S.C. 1988 for work performed before a local school board in advance of the filing of a suit under 42 U.S.C. 1983. Although Section 1988 contains the same "action or proceeding" language as Section 706(k), the Court distinguished *Carey* by noting that nothing in Section 1983 *requires* resort to administrative proceedings prior to the filing of suit (*Webb*, slip op. 6). The Court further explained that the time that is compensable under Section 1988 is that "'reasonably expended *on the litigation.*'" *Webb*, slip op. 8 (quoting *Hensley* v. *Eckerhart*, 461 U.S. at 433). Although the Court noted that some pre-litigation work, such as drafting the initial pleadings and developing a theory of the case, is performed "on the litigation," it stressed that there was no difficulty in the case before it in identifying the dividing line between the administrative proceeding and the judicial action. *Webb*, slip op. 8. For the same reason, the Court had no difficulty in determining that the work performed before the school board was not work performed "on the litigation." *Id.* at 8-9.

In the instant case, the language of Section 304(d) and analogous fee-shifting statutes strongly suggests that time spent on administrative proceedings is noncompensable. First, Section 304(d) is limited by its terms to "action[s]" and does not include "proceeding[s]." Several lower courts have recognized that the omission of the word "proceeding" from statutes that are virtually identical to Section 304(d) is dispositive of the issue.

Roosevelt Campobello International Park Comm'n v. *United States Environmental Protection Agency*, 711 F.2d 431, 438-439 (1st Cir. 1983) (interpreting Section 505(d) of the Clean Water Act of 1977, 33 U.S.C. 1365(d), as precluding fees for work performed in EPA administrative proceedings); *Sierra Club* v. *Gorsuch*, 672 F.2d 33, 42 (D.C. Cir. 1982), rev'd on other grounds *sub nom. Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983) (fee awards under Section 307(f) of the Clean Air Act, 42 U.S.C. 7607(f), limited to work performed in "judicial proceedings"); *Florida Power & Light Co.* v. *Costle*, 683 F.2d 941, 943 (5th Cir. 1982) (same). A "proceeding" is clearly something different from an "action." The "actions" contemplated by Section 304(d) are *judicial* actions, not administrative proceedings. In the instant case, neither of the courts below gave any consideration to the express language of limitation in Section 304(d).

Second, the particular administrative proceedings in which Delaware Valley participated bore little resemblance to "judicial actions." In *Webb*, for example, the Court approved the denial of fees for work performed before a local school board even though "witnesses were examined and opposing arguments considered and refuted in those proceedings," leading the plaintiff to characterize the work as "analogous to discovery, investigation and research that is part of any litigated proceeding" (*Webb*, slip op. 7-8). Here, by contrast, Delaware Valley, both in its comments on the proposed Pennsylvania regulations and in its participation in the EPA proceedings, did not participate in anything remotely "judicial." Moreover, participation in the activities for which Delaware Valley was awarded compensation is equally available to all citizens, whether or not they have brought, or intend to bring, litigation against an agency, and does not necessarily call for legal expertise warranting the expenditure of "attorneys' fees." See, *e.g.*, J.A. 65a (emphasis added), in which Delaware Valley characterized its comments on

petitioners' proposed regulations as time spent "investigating *technical* aspects of Commonwealth proposals respecting I/M regulations."

Third, it is undisputed that Delaware Valley was under no obligation either to comment on the proposed Pennsylvania rules or to participate in the EPA proceedings; indeed, the district court expressly recognized that participation in the EPA proceedings was *not* required by any of the court's orders (Pet. App. 34a). Thus, this case does not fall within the rationale of *Carey*. Nevertheless, the courts below were of the view that Delaware Valley's participation in the state and federal administrative proceedings was useful because either or both of those proceedings could have resulted in impairment of the rights secured by Delaware Valley under the consent decree. Pet. App. 17a, 36a, 55a, 57a & n.7. This rationale provides insufficient justification for ignoring the language of Section 304(d). While it may well have been reasonable, and indeed useful, for Delaware Valley to have participated in the administrative proceedings, its rights under the consent decree were at all times protected by the continuing jurisdiction retained by the district court. Had either or both of the administrative proceedings resulted in any significant impairment of the consent decree, Delaware Valley clearly could have sought relief from the district court.[25]

Finally, it is especially significant that when Congress has authorized funding for the mere presentation of

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[25] We do not mean to suggest that Delaware Valley should have forgone participation in the administrative proceedings simply because fees would not be available for that work. As the Court noted in *Webb*, slip op. 7 n.15:

> Of course, competent counsel will be motivated by the interests of the client to pursue state administrative remedies when they are available and counsel believes that they may prove successful. We cannot assume that an attorney would advise the client to forego an available avenue of relief solely because § 1988 does not provide for attorney's fees for work performed in the state administrative forum.

views in agency proceedings, it has spoken clearly. For example, Congress has expressly authorized EPA to award attorneys' fees for participation in rulemakings under the Toxic Substances Control Act, 15 U.S.C. 2605 (c)(4)(A). That statute plainly demonstrates that Congress knows how to draft language authorizing fee awards for participants in agency proceedings open to the public at large. Such funding is rare, however, and it has never been authorized for the proceedings in which Delaware Valley participated. Indeed, it is noteworthy that, contemporaneously with the passage of the 1977 amendments to the Clean Air Act, Congress considered and rejected proposals to fund public participation in agency proceedings through grants of attorneys' fees and other costs. See S. 270 and H.R. 3361, 95th Cong., 1st Sess. (1977). See generally *Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the House Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977). Thus, the court of appeals clearly erred in reading into Section 304(d) authorization to award fees for time that was not spent "on the litigation."

Despite the clear differences between Section 304(d) and the statutes considered in *Carey* and *Webb*, the court of appeals concluded (Pet. App. 55a, 57a & n.7) that the award of fees for Delaware Valley's administrative work was appropriate under *Webb*. In our view, the court read far too much into *Webb*. There, in *rejecting* Webb's claim to fees for administrative work, the Court noted in passing that Webb had failed to demonstrate "that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." *Webb*, slip op. 9. The court of appeals turned this statement on its head and concluded that fees may be awarded when the applicant *does* show that the administrative work was

" 'both useful and of a type ordinarily necessary to advance the . . . litigation' to the point where the party prevailed" (Pet. App. 57a n.7 (quoting *Webb*, slip op. 9)). Nothing in *Webb* suggests that this is the only relevant inquiry or even that proof of the two elements noted in *Webb* will suffice to support a fee award for administrative work.[26] And even if the Court intended its statement in *Webb* to establish a test for determining the appropriateness of fee awards for work done in optional administrative proceedings, that test would have no applicability in the case of a statute, such as Section 304 (d), that limits fee awards to the "costs of litigation" incurred in judicial "action[s]."

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[26] This Court did not clearly define work "of a type ordinarily necessary" to advance the litigation (*Webb*, slip op. 9). The immediately preceding passage in *Webb* suggests, however, that the Court had in mind no more than the routine services performed in connection with virtually all litigation, such as research, drafting the initial pleadings, and developing legal theories. See *Webb*, slip op. 8. If this is what the Court intended, then it is clear that participation in optional administrative proceedings is not work "of a type ordinarily *necessary*" to advance the litigation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

KAREN L. FLORINI
Attorney *

DECEMBER 1985

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* We acknowledge the assistance in the preparation of this brief of Raymond B. Ludwiszewski, a Department of Justice employee who has passed the Massachusetts bar examination but has not yet been admitted to practice.

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RESPONDENT'S

BRIEF

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No. 85-5 (6)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR et al.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Third Circuit

BRIEF OF RESPONDENT DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR

JAMES D. CRAWFORD*
JOYCE S. MEYERS
WILLIAM J. MAFFUCCI
Attorneys for Respondents

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103
215-751-2162

Of Counsel.

**Counsel of Record*

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QUESTIONS PRESENTED

1. Did not the district court correctly apply the law in a manner consistent with *Blum v. Stenson*, 465 U.S. 886 (1984), by increasing the basic fee award in three of the nine phases of the litigation for the risk of not prevailing and in one phase for the superior quality of counsel's work when these factors were not reflected in the basic hourly rate?

2. Was not the use of a multiplier of two for the risk of not prevailing in three phases and an additional multiplier of two to reflect the superior quality of counsel's work in one phase within the district court's discretion and fully justified by the unique facts and circumstances of this case?

3. Was not the award of attorneys' fees for work in related administrative proceedings a proper exercise of the district court's discretion under circumstances where the district court found that these activities were necessary for monitoring compliance with the consent decree and protecting DVCCCA's rights under the consent decree?

4. Should not the overall fee award be affirmed even if the fee might better have been structured differently had the district court had the benefit of the *Blum* opinion, since the court reduced both the number of hours and the hourly rates requested by DVCCCA with the expectation that it could use multipliers to adjust the lodestar in order to award a reasonable attorneys' fee?

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No. 85-5

IN THE

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October Term, 1985

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Respondents.

On Writ of Certiorari to the United States Court
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BRIEF OF RESPONDENT DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR

STATEMENT OF THE CASE

Procedural History

After having obtained substantial relief against the Commonwealth of Pennsylvania ("the Commonwealth") in the substantive litigation involving provisions of the Clean Air Act, Delaware Valley Citizens' Council for Clean Air ("DVCCCA") moved for attorneys' fees of $336,305.00, exclusive of court costs and the time involved in preparing the

fee petition, under 42 U.S.C. § 7604(d). In a judgment dated February 24, 1984, the district court disallowed or reduced some portions of DVCCCA's request but awarded DVCCCA attorneys' fees in the amount of $216,488.03, including court costs and fee petition preparation time. On an appeal by the Commonwealth and cross-appeal by DVCCCA to the United States Court of Appeals for the Third Circuit, the judgment of the district court was affirmed in its entirety, one judge dissenting on the use of multipliers. The Commonwealth now challenges the order of the court of appeals.

Statement of Facts

Pursuant to the Clean Air Act of 1970, the Pennsylvania Department of Environmental Resources in 1973 submitted a plan for meeting federal air quality standards in several areas of Pennsylvania. As modified and approved by the Environmental Protection Agency ("EPA"), the plan included a provision requiring a program for the inspection and maintenance of automobile emission systems ("I/M Program"). In 1976, because the Commonwealth had failed to implement an I/M Program, DVCCCA brought suit against the EPA and the Commonwealth under 42 U.S.C. § 7604. The EPA was later dismissed as a defendant when it, too, instituted an action against the Commonwealth.

In August 1978, the lawsuits were terminated when the Commonwealth agreed to a final consent decree in which it undertook to implement an I/M Program for ten counties. The Commonwealth, however, failed to comply with the requirements of the consent decree. Instead, it used every means at its disposal, including legislative action, resort to state courts, and attempted collaboration with the federal government, to circumvent the requirements of the consent decree and delay implementation of the I/M Program. As a result, more than six million Pennsylvanians were forced to breathe dangerously polluted air. DVCCCA was forced to engage in substantial activities to enforce the decree, for which

activities it sought reasonable attorneys' fees. For ease of analysis, the fee petition divided these activities into nine phases.

Phase I involved DVCCCA's motion to find the Commonwealth in violation of the decree by failing to publish proposed regulations for the program by July 1, 1979. The regulations were thereupon published, in effect mooting DVCCCA's motion. On September 20, 1979, a hearing was held before the district court at which a new implementation schedule was established. Phase II involved the submission by DVCCCA of comments concerning the proposed regulations that were required by the consent decree. Because of DVCCCA's comments, substantial revisions were made in the proposed regulations. Phase III of the litigation involved a modification of the consent decree.

Phase IV stemmed from another attempt by the Commonwealth to obtain a postponement of the implementation of an I/M Program, which, although ultimately unsuccessful on the merits, resulted in a twelve month delay. The federal government did not oppose the Commonwealth's efforts or support DVCCCA in its opposition to these efforts. DVCCCA moved the district court to find the Commonwealth in violation of the consent decree, and on May 20, 1981, the court did so. (J. App. 25a).[1] On June 10, 1981, the district court held a hearing on the Commonwealth's motion for reconsideration of that May 20 order, and on June 16 it denied that request. (J. App. 44a). A substantial amount of litigation followed, including requests for a stay filed by the Commonwealth in the district court and the court of appeals, and culminating in affirmance of the district court's orders by the court of appeals and a denial of a petition for certiorari by this Court. 674 F.2d 976 (3d Cir.), *cert. denied*, 459 U.S. 905 (1982). This phase of the litigation resulted in a clearer definition of the I/M Program, including the specification of a requisite number of inspection stations and referee stations and of a set type of equipment.

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1. "J. App." refers to the Joint Appendix. "Pet. App." refers to the appendix to the Petition for Writ of Certiorari filed by the Commonwealth.

Phase V resulted from the enactment by the Commonwealth General Assembly, over the veto of the Governor, of a law preventing expenditure of state funds for fulfillment of the Commonwealth's legal obligation under the consent decree to establish an I/M Program. A tremendous amount of litigation involving the Commonwealth's failure to comply culminated in a finding of contempt on the part of the Commonwealth and the establishment of a sanction enjoining the award of some $400 million in federal highway funds to the Commonwealth except for mass transit, highway safety, or pollution reduction projects. 533 F. Supp. 869 (E.D. Pa. 1982). The district court refused the Commonwealth's petition to stay the contempt order pending appeal, 533 F. Supp. 869 (E.D. Pa. 1982); the court of appeals granted a stay and denied a petition for rehearing en banc, 674 F.2d 987 (3d Cir. 1982), but then affirmed the district court's order declaring the Commonwealth in contempt and imposing the sanction. 678 F.2d 470 (3d Cir. 1982). The Commonwealth petitioned this Court for a stay of the court of appeals' decision and for certiorari. Both petitions were denied. 458 U.S. 1125 (1982), 459 U.S. 969 (1982). The actions of the Commonwealth in Phase V resulted in an additional delay of twenty-five months in the implementation of an I/M program.

As a direct result of the Commonwealth's failure to comply with the decree, several parties, including various Pennsylvania legislators, attempted to intervene in the action. To protect its rights under the consent decree, DVCCCA opposed, successfully, these interventions. 674 F.2d 970 (3d Cir. 1982). This comprised Phase VI.

In Phase VII, the Commonwealth proposed that the district court exempt several major highway construction projects from the contempt sanction that had been imposed by the district court. The United States government certified that these programs were proper exemptions, but DVCCCA argued to the district court that the court should approve only two minor exemptions and disapprove five major program exemptions. The district court adopted DVCCCA's approach. 551 F. Supp. 827 (E.D. Pa. 1982).

Phase VIII entailed activities in connection with the passage of necessary I/M legislation that permitted the I/M Program to go foward and the district court's resulting order to vacate the contempt sanction. Phase IX consisted of two elements: actions by DVCCCA's attorneys in state court opposing yet another attempt by several members of the Pennsylvania General Assembly to prevent implementation of the I/M Program, *Burd v. Commonwealth*, 66 Pa. Commw. 129, 443 A.2d 1197 (1982), *rev'd on other grounds sub nom. Scanlon v. Commonwealth*, 502 Pa. 577, 467 A.2d 1108 (1983), and participation by these attorneys in EPA regulatory activity in response to several requests by the Commonwealth for modifications in the state plan that would have substantially affected DVCCCA's rights under the consent decree. *See also* 755 F.2d 38 (3d Cir. 1982) (affirming district court's denial of Commonwealth's March 1984 motion to vacate 1978 consent decree), *cert. denied*, ___ U.S. ___, 106 S. Ct. 67 (1985).

In determining the attorneys' fee award, the district court eliminated more than one-third of the hours requested. Some of these hours were eliminated because they were not documented in sufficient detail. Most of the hours in this category were expended by an attorney who did not keep contemporaneous time records during parts of the litigation and had to reconstruct the time spent based on other records. Although the court was "satisfied that the reconstruction was, for the most part, carefully and accurately done," it concluded that it "must require more" in the way of specificity for such reconstructed records and, therefore, denied compensation for many hours. (Pet. App. 12a). Additional hours were excluded because the court disallowed all time spent by attorneys in preparing for or attending hearings at which another attorney for DVCCCA took the lead. (Pet. App. 13a-14a). This rule was applied uniformly without a specific inquiry into the contribution of a particular lawyer to the outcome of a hearing. The court also denied a limited number of hours for activities in related proceedings that it found were not necessary to protect DVCCCA's rights under the consent decree. Finally, hundreds of hours were eliminated

based on the court's conclusion, largely without explanation, that the time spent on a particular activity was "excessive" and that a lesser amount was "reasonable." Most of the hours eliminated on this ground had been spent in legal research and analysis or preparation of briefs, particularly in Phases V, VI, and VII (Pet. App. 28a-29a, 31a, 33a).

The district court also rejected requested rates based on attorney experience and determined the rates for the hours allowed based on the nature of each activity performed. The highest hourly rate, applied to work that the court found to be "the most difficult," was $100.00. A rate of $65.00 was applied to tasks that the court found could have been done by an attorney at the associate level. For work that "required little or no legal ability," the rate was $25.00. (Pet. App. 14a-15a). The result was a reduction in the average hourly rate by more than a quarter.

The district court multiplied the number of hours allowed by the hourly rate for each portion of the work to establish a "lodestar" figure which was less than half of the requested lodestar. The court then multiplied the lodestar for Phases IV, V, and VII, "where likelihood of success was least," to reflect the contingent nature of those phases of the litigation. (Pet. App. 39a). The court applied an additional multiplier to Phase V based on its finding that the work in Phase V was "superior" and produced an "outstanding result." (Pet. App. 39a).

SUMMARY OF ARGUMENT

The fee award should be affirmed in all respects not only because the district court correctly applied the law as it existed before this Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984), but also because the result is consistent with the principles enunciated in *Blum*. The district court did not engage in "double counting" when it adjusted the fee upward for the risk of not prevailing in three of the nine phases of the litigation and for the superior quality of counsel's work in one phase because these factors were not included in the number

of hours allowed or the basic hourly rate established by the district court for those phases.

The risk of not prevailing is a proper basis for increasing a fee award under certain circumstances. The practice is consistent with the intent of Congress in enacting fee-shifting statutes and is necessary to assure the vindication of rights under the numerous federal statutes that embody important national policies and priorities. This practice, which has been approved by many commentators and accepted, with minor variations, by the courts of appeals of all thirteen circuits, should be formally approved by this Court.

The increase of the fee award for the risk of not prevailing in three phases of the litigation was especially compelling in this case. DVCCCA faced unique obstacles to success as the Commonwealth relentlessly marshalled the forces of its executive, legislative, and judicial branches to circumvent the requirements of a federal court order. The Commonwealth even sought the collaboration of the United States government and obtained its support in seeking exemptions to the crucial contempt sanction imposed by the district court, sanctions which eventually persuaded the Commonwealth to abide by the consent decree. Because the Commonwealth's defiance of a federal court order created difficult issues concerning state sovereignty and the limits of federalism, DVCCCA's risk of not prevailing was substantial.

The upward adjustments for the risk of not prevailing and the quality of representation were fully justified by the facts and demonstrated substantial judicial restraint. While the district court found that "the contingent nature of plaintiffs' success has been apparent throughout this litigation," it awarded a multiplier for this factor only in the three phases "where likelihood of success was least." Similarly, although the district court awarded its highest hourly rate for that portion of the work requiring significant legal ability in several phases of the litigation, it increased the basic fee for quality of representation in only the one phase in which it found that the work was "superior" and produced an "outstanding result."

Moreover, the district court was correct in awarding fees for services in related administrative proceedings based on its finding that this work was necessary to enforce DVCCCA's rights under the consent decree. This portion of the fee award is fully supported by case law and serves to implement the policies underlying the fee-shifting statutes.

Finally, the Court should take into account the fact that the district court framed its fee award before *Blum* and, thus, without the benefit of this Court's *Blum* analysis. Accordingly, the district court reduced both the hours and the hourly rates requested by DVCCCA in the expectation that it could make upward adjustments by means of a multiplier in order to achieve the reasonable attorneys' fee Congress intended. Since the final fee was a reasonable one, this Court should not reverse even though it might require district courts post-*Blum* to treat contingency risks through additional hours and higher hourly rates and to compensate extraordinary quality by increasing rates and taking into account all of the hours worked rather than by reducing the number of hours and then rewarding counsel for how much they accomplished in so little time.

ARGUMENT

I. THE FEE AWARD SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT CORRECTLY APPLIED THE LAW, AND THE RESULT IS CONSISTENT WITH THE PRINCIPLES ENUNCIATED IN *BLUM v. STENSON*.

The district court in this case followed the well established approach of calculating attorneys' fees in two steps. First, the court calculated a "lodestar" figure by multiplying the total number of compensable hours by the hourly rates set by the court for the services rendered. The court then adjusted the lodestar *to reflect additional factors that were not included in the lodestar calculation*, specifically the quality of the work and the risk of not prevailing. This method of determining attorneys' fee awards has been expressly approved

and applied, with some variations, by thirteen courts of appeals. *See Maceira v. Pagan*, 698 F.2d 38, 39 (1st Cir. 1983); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-71 (2nd Cir. 1974); *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973) ("*Lindy I*"), 540 F.2d 102, 117-18 (3rd Cir. 1976) (en banc) ("*Lindy II* "); *Vaughns v. Board of Education*, 770 F.2d 1244, 1245 (4th Cir. 1985); *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983); *Louisville Black Police Officers Organization v. City of Louisville*, 700 F.2d 268, 275-77 (6th Cir. 1983); *In re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380, 382-83 (7th Cir. 1983); *International Travel Arrangers v. Western Airlines*, 623 F.2d 1255, 1274 (8th Cir. 1980); *White v. City of Richmond*, 713 F.2d 458, 460-62 (9th Cir. 1983); *Ramos v. Lamm*, 713 F.2d 546, 552-58 (10th Cir. 1983); *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1532-34 (11th Cir. 1983); *Copeland v. Marshall*, 641 F.2d 880, 892-94 (D.C. Cir. 1980); *Crumbaker v. Merit Systems Protection Board*, No. 85-1982 (Fed. Cir. Jan. 8, 1986) (LEXIS, Genfed library, Courts file).

There is nothing in this Court's recent pronouncements on the subject of attorneys' fee awards that would invalidate this approach. In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), this Court held that the "product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward. . . ." The district court in this case explicitly relied on *Hensley* in applying a multiplier to three of the nine phases of the litigation. (Pet. App. 8a-9a, 38a).

The Commonwealth argues that the multipliers for quality and the risk of not prevailing are in conflict with this Court's holding in *Blum v. Stenson*, 465 U.S. 886 (1984) (Comm. Brief at 10-11, 18-20), arguing that these multipliers represent a form of "double counting" that was rejected in *Blum*. The Commonwealth's argument lacks merit for two reasons. First, there is nothing in *Blum* that precludes the application of multipliers for either the risk of not prevailing or the quality of work. Second, the use of multipliers did not

constitute double counting in this case because the district court did not include the risk of not prevailing and the quality of work as factors in setting the hourly rate for the three phases in which multipliers were used.

In *Blum*, the majority explicitly declined to address the use of the contingency factor in fee awards, thus leaving the well established practice intact, *see* 465 U.S. at 901 n.17, while the concurrence explicitly argued that the contingency of success is a proper basis on which to base fee adjustments. 465 U.S. at 902-04. The Court also noted that the quality of representation is only "generally" reflected in an hourly rate and that upward adjustments based on quality may still be justified. *Blum*, 465 U.S. at 899.

Of course, the district court did not have the benefit of the *Blum* opinion when it determined the fee award in this case. Thus, its explanation of the basis for the award may not have been cast in the precise language approved in *Blum*. The Commonwealth attempts to capitalize on this fact by noting the district court's reference to "new and novel issues" (Pet. App. 39a) involved in the case. The Commonwealth is relying on this Court's holding in *Blum* that the novelty and complexity of issues should not have been considered independent factors in the upward adjustment of the basic fee in that case because they were "presumably" reflected in the number of billable hours recorded by counsel. 465 U.S. at 898. This reliance, however, is misplaced. *Blum* did not forbid consideration of the novelty and complexity of issues to the extent that they reflect the contingent nature of success and the quality of the legal services rendered. *See, e.g., Sierra Club v. Clark*, 755 F.2d 608, 620 (8th Cir. 1985) (rejecting challenge based on *Blum* to enhancement of award based on "novel" issue as well as contingency and quality). *See also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974) ("the tangible factors which comprise the 'risk of litigation' might be determined by asking the following questions: . . . are the issues novel and complex or straightforward and well worn?"); *Municipal Authority v. Pennsylvania*, 527 F. Supp. 982, 1000 (M.D. Pa. 1981) ("novelty" of legal and factual issues listed as

one of the factors evidencing the contingent nature of the litigation).

The district court in this case clearly did not consider the novelty of the issues as a separate factor justifying the upward adjustment. Instead, the district court explicitly increased the fee award based on the factors of quality and the contingent nature of DVCCCA's success. (Pet. App. 39a). A passing reference to "new and novel issues" was included in the district court's description of the "contingent nature of plaintiff's success" as one of several reasons for the riskiness of the undertaking. (Pet. App. 39a). Had the district court had the benefit of the *Blum* opinion, it might have avoided this language. Nevertheless, the relevant inquiry is not whether it used an impermissible word but whether in fact it engaged in "double counting." An analysis of the court's approach demonstrates that it did not.[2]

The district court's total analysis of the fee award was based on certain assumptions about the legal framework for establishing such an award. (Pet. App. 7a-9a). Thus, on the assumption that upward adjustments were proper for the risk of not prevailing and quality of work, the district court did not incorporate these factors into the hourly rates or the number of hours allowed. On the contrary, the district court strictly scrutinized the hours for which fees were requested and eliminated a large number of them. Indeed, as the Commonwealth notes, in those phases of the case in which the district court enhanced the lodestar, it reduced the number of hours for which fees were allowed by almost fifty percent of the hours requested. (Comm. Brief at 20). Contrary to the

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2. The Seventh Circuit has recently noted that "the district court can make an adjustment in the process of computing a lodestar or after computing a lodestar, so long as the court provides an explanation for each adjustment and does not adjust for the same factor twice. . . . The district court is in the best position to determine what fees are reasonable, and the court does not abuse its discretion by modifying the lodestar or other fee setting approach into a method more convenient on the facts of a particular case." *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646, 651 n.3 (7th Cir. 1985).

Commonwealth's representations, however, most of these reductions did not reflect on the quality or efficiency of counsel's work. Rather, the court questioned the reconstructed time records of work concededly done, ruled that more than one lawyer could never be compensated for participating in a hearing, or simply concluded that the amount of time spent on legal research and analysis and preparation of briefs which produced a superior product was, nevertheless, "excessive," not recognizing that these activities are among the most labor-intensive and time-consuming of all those in which attorneys engage. In addition, the district court established hourly rates for each task performed based solely on the nature of the task — *i.e.*, the extent to which it required the application of legal skills or ability — with reference to neither the quality of the work produced nor the risk of not prevailing in that phase of the work.

Thus, the kind of double counting about which the Commonwealth complains simply did not occur. This is obvious from the fact that the same rules concerning the hours allowed and the same hourly rates were applied to all nine phases of the litigation while multipliers for the risk of not prevailing were applied to only three phases and a multiplier for quality was applied to only one. Clearly, the district court did not reflect the risk of not prevailing or the quality of the work in the number of hours or the hourly rates established for phases IV, V, and VII.

As the above analysis demonstrates, both the approach used and the award granted reflect a correct application of the law that is not in conflict with the principles enunciated in *Blum*. Both the Commonwealth and the United States ask this Court to reverse the fee award and hold that the risk of not prevailing is no longer a permissible basis for applying an upward adjustment. For reasons that will be discussed more fully below, such a result would conflict with congressional intent and undermine the important policies underlying fee-shifting statutes.

Moreover, such a result would constitute not a clarification of existing law but a sharp break with practices that have

been almost universally accepted in the federal courts of appeals. If the Court were to determine that such a radical departure from previous law is appropriate, it would be inequitable to enforce such a ruling retroactively and apply it to the hundreds of fee awards already determined under well established legal principles. It would clearly be unfair to reduce the fee award in this case by eliminating the multipliers without allowing the district court to reexamine and recalculate the hours it allowed and the hourly rates it established on the assumption that upward adjustments were permissible. Thus, if the Court should decide to change the method of calculating fee awards, it should either impose this change prospectively or it should remand the fee award in this case for reconsideration in light of the new standard.

II. THE INCREASE OF THE FEE AWARD IN PHASES IV, V, AND VII BASED ON THE RISK OF NOT PREVAILING WAS PROPER IN LIGHT OF THE LAW, SOUND POLICY CONSIDERATIONS, AND THE FACTS OF THE CASE.

When Congress undertook to encourage private enforcement of various remedial statutes by permitting the award of reasonable attorneys' fees to successful plaintiffs, it included in its view of reasonableness the fact that lawyers ran the risk of no recovery because of the danger that the rights they sought to vindicate might not be recognized and the virtual assurance that any payment would be delayed. Every court of appeals has reached this conclusion. Most important, the facts of this case show just why either an upward adjustment in either hourly rates or the application of a multiplier to the lodestar is vital to accomplish the congressional purpose under the Clean Air Act of 1970.

A. A District Court's Discretion To Increase a Fee Award Based on the Risk of Not Prevailing Is an Essential Part of the Legislative Scheme Underlying Attorneys' Fee Statutes and Rests on Sound Policy Considerations.

The congressional purpose underlying the attorneys' fees provisions of statutes such as the Clean Air Act is to encourage litigation aimed at furthering the substantive goals of the statutes while deterring frivolous or harassing suits. *See, e.g.*, Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 Harv. L. Rev. 677, 685 (1983); Comment, *Citizens Association of Georgetown v. Washington: Awarding Attorneys' Fees in Citizen Suits to Enforce the Clean Air Act*, 125 U. Pa. L. Rev. 1402, 1409, 1410-11 (1977). The legislative history of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, makes it clear that the intent of Congress was to provide adequate compensation to attract competent counsel to act as "private attorneys general." *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910-13 ("Senate Report").

Permitting trial courts to award a premium based on the risk of not prevailing is essential to the achievement of these congressional goals. For, as the Solicitor General has acknowledged: "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." Brief for the United States at 19, *Blum v. Stenson*, 465 U.S. 886 (1984).

The legislative history demonstrates that Congress intended fee-shifting statutes to permit upward adjustments in fee awards based on the risk of not prevailing. Congress emphasized the appropriateness of upward adjustments in general by requiring that the standards governing other complex federal litigation, such as antitrust cases, also govern § 1988 fee awards. Senate Report at 5913. The Senate Report also acknowledged the propriety of an upward adjustment for the contingent nature of payment by citing *Johnson v. Georgia*

Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974) (prescribing method of calculating attorneys' fees, which it found consistent with guidelines recommended by the American Bar Association, that includes consideration of whether the fee is fixed or contingent), and *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977) (awarding upward adjustment due in part to the contingent nature of the undertaking and the risk of receiving no payment at all), as examples of cases that correctly applied the appropriate criteria.

In enacting fee statutes, Congress recognized the obvious fact that many cases that should be brought to vindicate important national policies could not carry their weight in the marketplace if the risk factor were not taken into account. Congress understood that *a lodestar fee reflects the billing practices of lawyers who bill and get paid on a current basis regardless of outcome*. Consequently, this amount does not provide adequate compensation for attorneys who not only risk receiving no payment at all but also face a long delay in payment even if they are successful in obtaining a fee award. The impact of delay is well illustrated by the present case, which involves fees for work performed as long ago as 1979 and still not collected. Thus, a fee is not "reasonable" within the meaning of Congress if it does not include a premium for the uncertainty as to when or whether a fee will be recovered. As the Court of Appeals for the Sixth Circuit has explained, "the contingency factor is not a 'bonus' but is part of the reasonable compensation to which a prevailing party's attorney is entitled . . . ." *Northcross v. Board of Education*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 991 (1980). The cost of waiting for money that may never materialize must be accounted for in the marketplace. Since Congress clearly intended to provide for fee awards sufficient to attract competent attorneys who would otherwise spend their time in more lucrative litigation, the practice of awarding adjustments for the risk of not prevailing is essential to implement the purpose of the fee statutes.

Congress has been particularly concerned with inducing litigation to insure proper administrative implementation of environmental statutes. *See* Note, *supra*, 96 Harv. L. Rev. at 685. Thus, the citizens' suit provision of the Clean Air Act is premised on the proposition that private enforcement is essential to the effectuation of the substantive scheme, and the award of attorneys' fees is essential to effective private enforcement. *See* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 306 (1977); Comment, *supra*, 125 U. Pa. L. Rev. at 1409, 1410-11. In light of this congressional directive, it is clear that the availability of a premium for the risk of not prevailing is a crucial part of the enforcement mechanism Congress intended to provide for environmental statutes.

These policy reasons underlying the application of the contingency factor to fee awards were forcefully articulated in the context of civil rights cases in *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1534 (11th Cir. 1983):

> Vindication of the policy of the law depends to a significant degree on the willingness of highly skilled attorneys, such as those now before the court, to accept employment in discrimination cases on a wholly contingent basis. They will hardly be willing to do so if their potential compensation is limited to the hourly rate to which they would be entitled in noncontingent employment. Busy and successful attorneys simply could not afford to accept contingent employment if those were the rules that were applied. The enforcement of our civil rights acts would then be entrusted largely to less capable and less successful lawyers who lack sufficient employment. Such an arrangement would ill serve policies of enormous national importance.

The use of the contingency factor, of course, has always been a matter of discretion for the trial judge. An increase for the risk of not prevailing has never been automatic, nor should it be applied to reward plaintiffs, or their attorneys,

for litigating cases without merit. Where the risk of not prevailing is great for reasons unrelated to the merits, however, the trial court's discretion to increase the fee award promotes the federal policy of encouraging citizens' suits to strengthen enforcement of laws that are vital to our national welfare.

The Commonwealth does not really address these policy considerations but argues that the contingency factor should be abandoned because it may produce unreasonable results. This argument rests primarily on a *reductio ad absurdum* example of the potential for excess in a system that necessarily does not admit of mathematical precision. The Commonwealth quotes *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984), in which the court asks us to "imagine a class of cases where only one in 50 plaintiffs prevails" and asserts that the risk multiplier in such cases would be 50. The Commonwealth argues that the possibility of such a result makes any increase in a fee award based on the risk of not prevailing improper. (Comm. Brief at 10-14). Neither the Commonwealth nor any other commentator on the subject, however, has suggested that any court has ever indulged, or is likely to indulge, in such excess. A survey of attorneys' fee cases confirms that courts have generally been conservative in the use of multipliers. *See Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613 (1st Cir. 1985) (surveying circuits after *Blum*). Moreover, commentators have noted that when an adjustment is made on the basis of the contingency award, it is often too small. *See* Note, *supra*, 96 Harv. L. Rev. at 686 n.51.

The Commonwealth also relies on criticism of the use of the contingency factor in Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473 (1981) (Comm. Brief at 14). The Commonwealth, however, is quoting Leubsdorf out of context. While Leubsdorf acknowledges some of the problems inherent in the current system of "contingency bonuses," he nevertheless recognizes "the correct perception that reasonable fees must be larger when the plaintiff's lawyer will be paid only if his client succeeds . . . ." 90 Yale L.J. at 474. Although Leubsdorf considers several possible approaches to correcting some of the potential inconsistencies

of the system, the solution he puts forward as the simplest and most logical is the uniform multiplication of the lodestar by two on the theory that doubling fees would encourage suits with at least an even chance of success. 90 Yale L.J. at 474-75, 511-12. The application of a multiplier of two for the risk of not prevailing that Leubsdorf recommends is precisely what the district court did here, although it did so only in the three phases of this case where the risk was greatest.

The intention of Congress in the statutes awarding attorneys' fees is to encourage litigation to enforce its remedial legislation. The congressional purposes underlying the practice of increasing attorneys' fee awards based on the risk of not prevailing make it essential that district courts continue to be permitted to apply such a multiplier in appropriate cases.

B. The Decisional Law Clearly Permitted the District Court To Increase the Basic Fee Award Based on the Risk of Not Prevailing.

Every federal circuit has agreed that the practice of increasing fee awards based on an assessment of the risk of not prevailing was within the purpose and intent of Congress when it enacted attorneys' fee statutes. As discussed above, the practice was well established in the Third Circuit and almost universally accepted by the other courts of appeals at the time the district court entered the award in this case. The Commonwealth has cited no case to the contrary but relies on an assumption that *Blum v. Stenson* somehow changed the law on the use of the contingency factor. On the contrary, however, *Blum* left the law intact by declining to consider the issue at all.

Moreover, a survey of federal appellate court opinions after *Blum*, including those on which the Commonwealth relies, reveals the gross hyperbole in the Commonwealth's assertion that "reliance on the likelihood of success as a factor to be included in the multiplier for an award of attorney's fees . . . is in conflict with opinions of other Circuit Courts."

(Pet. App. 14). Indeed, the use of the contingency factor to enhance a fee award has been either explicitly approved or acknowledged as permissible in virtually every federal appellate court decision that has addressed the issue since *Blum* was announced.

The nine courts of appeals that have directly ruled on the use of contingency multipliers since *Blum* have agreed that such use is not only permissible but sometimes essential. *See, e.g., Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613 (1st Cir. 1985) ("adjustment of the lodestar figure, after examining the particular risks assumed by an attorney in a particular case, may be necessary in order to provide the 'reasonable attorney fee' envisioned by Congress"); *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3d Cir. 1984) ("Congress authorized district courts to award upward adjustments to compensate for the contingent nature of success, and thus for the risk of nonpayment in a particular case"); *Vaughns v. Board of Education*, 770 F.2d 1244, 1245 (4th Cir. 1985) ("while a contingency fee [enhancement] is to be reserved for the case producing exceptional success, . . . the determination of when justifying exceptional circumstances exist is likewise a matter inevitably committed to the trial judge's discretion"); *Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985) ("because of its singular viewpoint, the district court is best equipped to determine . . . whether the risk of the case not prevailing calls for an enhancement of the lodestar fee"); *LaDuke v. Nelson*, 762 F.2d 1318, 1333 (9th Cir. 1985) (district court properly applied multiplier to adjust fee upward based on contingent nature of the fee awards); *Jones v. Central Soya Co.*, 748 F.2d 586, 591 (11th Cir. 1984) ("it is well established in this circuit, . . . that a contingency fee arrangement may justify an increase in an award of attorney's fees"); *Murray v. Weinberger*, 741 F.2d 1423, 1426 (D.C. Cir. 1984) ("the factors which may warrant an adjustment of the lodestar . . . include . . . the risk that no fee will be paid"); *Crumbaker v. Merit Systems Protection Board*, No. 85-1982 (Fed. Cir. Jan. 8, 1986) (LEXIS, Genfed library, Courts file) (since rates used in computing lodestar figure did not account for the risk that no

fee would be obtained, lodestar should have been adjusted accordingly).

The Commonwealth relies heavily on the criticism of the use of the contingency factor in *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984). More recently, however, the same court has made it clear that its occasional refusal to permit upward contingency adjustments to grants of attorneys' fees should not be misinterpreted as establishing a general prohibition on such adjustments but rather as reflecting a judicial awareness of the need to assure that such adjustments do not result in windfalls to plaintiffs: "We do not mean to imply that a multiplier for the contingent nature of success is inappropriate when lawyers bear the risk of nonpayment and the delay in payment." *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646, 661 (7th Cir. 1985). The court specifically noted that such an upward adjustment "provides an inducement for lawyers to accept meritorious cases that might otherwise go unheard." *Id.* at 662.

The only other cases cited by the Commonwealth that restrict the use of the contingency factor after *Blum* are both from the District of Columbia Circuit. *See Murray v. Weinberger*, 741 F.2d 1423 (D.C. Cir. 1984); *Laffey v. Northwest Airlines*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 3488 (1985). (Comm. Brief at 12-13). In *Murray v. Weinberger*, however, the court did not eliminate the contingency factor but reaffirmed its use. Noting that *Blum* had not decided the issue, the court reiterated its "minimum requirements that must be met in order to justify an increase in the lodestar figure due to the risk of nonpayment if the client does not prevail." 741 F.2d at 1431. Under the District of Columbia criteria, an upward adjustment is proper when: (1) the lodestar itself does not comprehend an allowance for the contingent nature of fee payment; (2) there was no fee arrangement with the client to eliminate the risk of non-payment; and (3) the case is exceptional within the meaning of *Blum*. *Id.* All three factors are present in this case. *Laffey*, decided a month later, did not change this approach but denied enhancement of the fee award because the trial

court's factual findings indicated that the case was not exceptional. 746 F.2d at 29 n.151. Moreover, as Judge Skelly Wright correctly concluded in his dissenting opinion in *Laffey*, the prerequisite that the case be deemed "exceptional" in order to apply a contingency multiplier is unfounded and rests on an overreading of the *Blum* requirement for multipliers based on quality. 746 F.2d at 34-39 & n.16.

The four courts of appeals that have not yet directly addressed the status of contingency multipliers after *Blum* have taken no position inconsistent with their previous holdings that such multipliers can, and sometimes must, be used. *See, e.g., Malchman v. Davis*, 761 F.2d 893, 905, 909 (2d Cir. 1985) (majority had approved district court's adoption of an attorneys' fee award that had been negotiated by the parties; dissent believed that "the amount of the fee should . . . be left to the court for determination after its independent review and approval of a settlement" and that "included among the factors to be considered, of course, are the degree of risk incurred and whether it justifies a risk premium"); *Sims v. Jefferson Downs Racing Association*, No. 83-3606 (5th Cir. Dec. 18, 1985) (LEXIS, Genfed library, Courts file) (reaffirming court's influential holding in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974), that lodestar calculations can be adjusted by consideration of numerous factors, including whether the fee is fixed or contingent); *Davis v. Combustion Engineering*, 742 F.2d 916, 923 (6th Cir. 1984) (disapproving contingency enhancer not because such adjustments are impermissible *per se* but rather because district court had failed to articulate the basis for the award); *Jordan v. Heckler*, 744 F.2d 1397, 1401 (10th Cir. 1984) (noting that "apparently the only element not treated in *Blum* was that of 'risk' of loss").

Thus, the district court's application of a multiplier based on the risk of not prevailing is fully supported by legal precedents in all of the courts of appeals, and the only members of this Court to address the question, the two Justices

concurring in *Blum*, have also expressly approved the practice. The district court correctly applied the law in considering the risk of not prevailing as a factor in multiplying the basic award in the three phases of the litigation in which DVCCCA's success seemed least likely, and the use of that factor should be affirmed by this Court.

C. The Increase of the Fee Award Based on the Risk of Not Prevailing Is Especially Compelling in This Case Because of the Extreme Recalcitrance of the Commonwealth, the Difficult Issues of Federalism, and the Protracted Nature of the Litigation.

The Commonwealth argues that even if a multiplier based on the risk of not prevailing is permissible in some cases it would not be justified in this case because the existence of the consent decree virtually assured DVCCCA's success. The United States supports this argument and further argues that DVCCCA's success was made even more likely by the federal government's participation as a plaintiff in the litigation. (U.S. Brief at 34). These arguments are disingenuous at best.

That the existence of the consent decree did not guarantee success is evidenced by the years of litigation required to enforce it. If the Commonwealth did not enter into the consent decree in bad faith, it is difficult to find any other way to describe its conduct during the implementation phase. The Third Circuit Court of Appeals, to which the Commonwealth repeatedly resorted in its attempts to delay compliance, described the protracted litigation as follows:

> Nine years ago plaintiffs sued the state; two years later the state entered into a consent decree and then proceeded to renege on its provisions. To this day, every branch of government of the Commonwealth of Pennsylvania — the executive, legislative, and judicial — has fought tooth and nail every effort of plaintiff to make Pennsylvania respect the provisions of a federal statute.

(Pet. App. 65a). Thus, instead of good-faith compliance with the provisions to which it had committed itself, the Commonwealth mounted a multifaceted attack on the consent decree which required DVCCCA to do battle on many fronts, "through complicated detours and treacherous road blocks." (Pet. App. 66a). The Commonwealth made it clear that it would stop at nothing, including legislative action in direct violation of the decree, to avoid fulfilling its commitments. Even a finding of contempt and the imposition of the sanction of withholding federal highway funds did not persuade the Commonwealth to comply. Rather, in apparent collusion with the United States government, the Commonwealth sought to circumvent the contempt sanctions by having the United States certify that major highway projects qualified as exemptions to the sanctions. If these exemptions had been upheld, they would have swallowed the rule and the sanctions would have been totally ineffectual. Thus, DVCCCA was facing extreme and unusual recalcitrance on the part of a formidable opponent that was not averse to using the legislature and the state courts — and the cooperation of the United States government as well — to support it in flouting a federal court order. That the risk of not prevailing was greatest in Phases IV, V, and VII is clearly demonstrated by the fact that the Commonwealth not only appealed to the Third Circuit but also filed petitions for certiorari to this Court in Phases IV and V and the fact that it had the support of the federal government in Phases IV and VII.

The strength and vehemence of DVCCCA's adversaries were not the only facts jeopardizing the success of this litigation. In addition, DVCCCA was faced with the sensitive and difficult issues of cooperative federalism and questions concerning the power of a federal court to intrude upon state sovereignty. The district court explicitly expressed its concern for the avoidance of undue interference with state sovereignty when it was faced with the action of the state legislature in contravention of the consent decree. (Pet. App. 39a). In spite of the consent decree, it was far from clear at the outset that DVCCCA would succeed in persuading the

district court, and later the court of appeals, that a meaningful sanction could be imposed that would protect DVCCCA's rights under the consent decree without unduly invading the sovereignty of the Commonwealth.

The combination of this difficult issue with the recalcitrance and bad faith of the Commonwealth, supported at certain stages by the United States government, compels the conclusion that DVCCCA's risk of not prevailing was substantial. Indeed, this case presents precisely the factual and legal considerations compelling the use of contingency multipliers. To the incalculable benefit of six million citizens of Pennsylvania, DVCCCA has championed a completely meritorious cause against enormous odds — odds reflecting the tremendous power of the Commonwealth to effectuate defenses which it now argues were doomed to failure.

In addition, the protracted nature of the litigation justifies the use of a contingency multiplier in this case. The ultimate success achieved by DVCCCA was not only in doubt at various times but was also a very long time in coming. The Commonwealth, in seeking every possible avenue of delay of the I/M Program, also managed to postpone DVCCCA's entitlement to counsel fees for several years. Thus, some of the work for which fees are still being sought was performed as long ago as 1979. To compensate such work in 1986 by paying the same amount that would have been due if it had been collected immediately is, in effect, to discount the fee. Such a result is clearly unreasonable, inequitable, and contrary to the intent of Congress.

The Commonwealth's outrageous intimation that, throughout the litigation, the DVCCCA's likelihood of success was great (Pet. App. 15-16) is nothing more than a transparent attempt to disclaim its power and deny the impact of its protracted resistance on the value of the fees ultimately awarded. If the DVCCCA had pursued so meritorious a claim against an opponent less formidable and recalcitrant than the Commonwealth of Pennsylvania, its likelihood of success in a reasonable period of time *would* have been great.

In choosing to address the problem of toxic automobile emissions through the courts, in accordance with the directive of Congress, the DVCCCA was forced to confront one of the few adversaries that might have been powerful enough to defeat its efforts and that, in any event, succeeded in creating long and costly delays. The Court should encourage this approach to the enforcement of legislation vital to the public welfare by approving the use of contingency multipliers to reflect the enormous risk of failure that the DVCCCA has overcome, especially in Phases IV, V, and VII.

III. THE USE OF A MULTIPLIER FOR QUALITY IN PHASE V WAS FULLY JUSTIFIED UNDER THE *BLUM* CRITERIA.

The district court described DVCCCA's attorneys' work as "superior" in Phase V of the litigation in which the court imposed a civil contempt sanction on the Commonwealth. (Pet. App. 39a). The work in this phase was not simply a matter of reporting the violation of the consent decree to the court and obtaining a clear sanction. Rather, as discussed above, it involved a delicate balancing between the need to enforce a federal judicial decree and the requirement of respecting state autonomy. The need to achieve that difficult balance stems from the Tenth Amendment, the federal nature of our system of government, and the Clean Air Act itself, which, like many environmental statutes, mandates a system of shared federal and state responsibility and cooperation for the control of air pollution. *See* 42 U.S.C. § 7402.

In its fee decision, the district court recalled "its concern for the avoidance of undue interference with essential elements of state sovereignty" and cited its reported opinion resulting from Phase V in which it had discussed the "serious limits . . . on the powers of the federal government to require action on the part of state government" when faced with a state decision that "clearly interferes with the realization of a federal judicial decree." 533 F. Supp. at 878. The court concluded that in the resolution of this extremely "difficult issue"

the work of DVCCCA's attorneys "helped not only this court but also the court of appeals." Citing *Ursic v. Bethlehem Mines*, 719 F.2d 670, 674 (3d Cir. 1983), the district court stated that this superior quality of work culminated in an "outstanding result" that justified an increase in the fee award. (Pet. App. 39a).

The district clearly was not double counting for high quality, as the Commonwealth asserts. On the contrary, the increase for quality in Phase V was fully consistent with the criteria set forth in *Blum*. In *Blum*, the Court noted that, while quality is "generally" reflected in the hourly rate, an upward adjustment may be justified where "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and . . . the success was 'exceptional.' " 465 U.S. at 899.

In the present case, it is clear that the superior quality of the work in Phase V was not reflected in the hourly rate or in the number of hours allowed. On the contrary, the highest hourly rate in Phase V was no higher than the highest hourly rate in the other eight phases of the litigation. The court stated that this rate was based only on "the court's determination of the attorney's reputation, status and type of activity" (Pet. App. 8a) — *i.e.*, the nature and complexity of the tasks done — and not on the quality of the work. In practice, however, the only factor that determined the rate applied to a particular activity was the court's assessment of the amount of legal skill it required without regard to the reputation or status of the attorney. Thus, two experienced and highly respected attorneys were compensated at the rate of only $25.00 for their work in Phase V. Even the "extensive research and analysis" that resulted in "superior" work on a "difficult issue" (Pet. App. 28a, 39a) was compensated at only $100.00 an hour, an amount that was clearly below the prevailing market rate for work requiring considerable legal skill. Moreover, the court reduced the number of hours requested in Phase V by almost 300 hours. Thus, the lodestar figure for Phase V represents only a modest fee applied to

fewer than half the hours actually expended in that important and difficult portion of the litigation. Based on its specific finding that the quality of the work in Phase V was superior, the district court applied the multiplier to the hourly rate that would have been applicable if the work had been merely competent, as *Blum* directs.

The Commonwealth relies on the Court's suggestion in *Blum* that it would be only the "rare case" that would qualify for such an upward fee adjustment based on quality. 465 U.S. at 899. Since the district court's fee decision preceded *Blum*, the court did not make a specific factual finding that this case was "rare." The district court did note, however, that this case was "unlike other cases where attorneys' fees have been awarded." (Pet. App. 9a). Moreover, the facts themselves compel the conclusion that the case is not only rare but perhaps unique. The district court specifically noted the complex problems of federalism presented by the unprecedented situation in which a state voluntarily entered into a consent decree assuring compliance with a federal law, violated that decree, passed legislation over the executive's veto prohibiting compliance with the decree, and then sought a stay of the implementation of the decree based on that legislation. The court of appeals, which had the benefit of the *Blum* decision, specifically held that the Commonwealth's "devious formal actions to avoid the enforcement of a federal court order" made this case "most unusual, and therefore a rarity." (Pet. App. 65a). The unusual factual and legal context of this litigation clearly qualifies this case as one in which the rare factors justifying an upward adjustment of attorneys' fees are present.

This Court has continued to emphasize that a district court is in the best position to evaluate the quality of representation and has a superior understanding of the litigation. *See Hensley v. Eckerhart*, 461 U.S. at 437. In this case, however, the court of appeals, which affirmed the award, was also in a position to evaluate the quality of the work directly since Phase V was the subject of an appeal to it. The district court noted, in awarding the multiplier for quality for Phase V, that

"plaintiffs' work in this phase helped not only this court but also the court of appeals in resolving this difficult issue." (Pet. App. 39a). The court of appeals specifically acknowledged the excellence of DVCCCA's work in this phase in affirming the fee award:

> Because this case involved a head-on collision between two court systems, plaintiff was treading through a minefield. Nevertheless, plaintiff's counsel performed exceptional services in vindicating the dignity of the federal court system, walking the tight, and sometimes imperceptible, line that divides the competencies of two governmental sovereignties, insuring full compliance with federal legislation designed for the safety and protection of the citizens, and vigorously battling a state governmental system that sought to defy a lawful order of this court system by resorting to discredited concepts of nullification, first by its legislature and next by its supreme court.

(Pet. App. 66a-67a).

In short, the essential test is whether the quality of service delivered was superior to that reasonably expected at the hourly rate. In Phase V, unlike the other phases where work was compensated at the top rate, the district court stated that the DVCCCA attorneys' work was "superior" and awarded a multiplier based on that assessment. In light of the nature of the issues in this phase and the fact that the average lodestar compensation of DVCCCA's attorneys in Phase V was less than $85.00 per hour, the use of a multiplier for superior work and an outstanding result is clearly allowable under the Supreme Court's decision in *Blum*.

IV. THE MULTIPLIERS USED WERE REASONABLE UNDER THE EXTRAORDINARY CIRCUMSTANCES OF THIS LITIGATION AND ADEQUATELY SUPPORTED BY FINDINGS OF FACT.

The Commonwealth attacks the multipliers applied by the district court on several grounds. First, the Commonwealth argues that the award of a multiplier for quality on the facts of this case represents "double counting." This argument has been disposed of above and need not be reiterated here. Suffice it to say that the application of the multiplier for quality to only one of the nine phases makes it clear that no such double counting occurred since the highest hourly rate in Phase V was identical to the highest hourly rate in the other phases and the number of hours was sharply reduced. The district court made a specific factual finding that the work in this phase was "superior" and the result "outstanding." The multiplier was used because the basic hourly rate was not adjusted upward to account for the outstanding quality of the work in this phase, nor did the number of hours allowed reflect this factor.

The Commonwealth also argues that the multiplier was improper under *Blum* because it was based on the novelty and complexity of the issues. An examination of the district court's opinion, however, demonstrates that the novelty and complexity of the issues, while noted by the district court in passing, were subsumed under the factors of quality and the risk of not prevailing and were not independent factors on which the multipliers were based. (Pet. App. 39a).

Finally, the Commonwealth complains that the multipliers were "enormous" and were based on "conclusory statements." The size of the multipliers, however, was well within the discretion of the district court and fully justified in this case. Indeed, the total fee, even with the application of multipliers, is modest in comparison with the magnitude of the case, which not only involved the cost — in money and in

human suffering — of the I/M Program for an indefinite number of years but eventually required a contempt sanction that held up $400 million worth of federal highway funds.

Moreover, the size of the multipliers in selected phases of this case was commensurate with those awarded by other district courts for successful litigation of entire cases in which parties have sought court orders requiring state governmental bodies to respect important environmental statutes. *See, e.g., Municipal Authority v. Pennsylvania*, 527 F. Supp. 982 (M.D. Pa. 1981) (multiplier of 4.5 based on factors of quality and contingency applied to entire award for litigation involving enforcement of Water Pollution Control Act); *Keith v. Volpe*, 502 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5 based on contingency, quality, and inflation applied to entire award for litigation involving environmental protection and civil rights). Such multipliers also have been applied in antitrust and securities litigation. *See, e.g., In re Gypsum Cases*, 386 F. Supp. 959, 967 (N.D. Cal. 1974) (multiplier of 3 based on contingency and quality applied to entire award to liaison counsel in multiparty antitrust litigation; court commented that "if private enforcement of the antitrust laws is to be expected and encouraged, it is in this court's view eminently reasonable to multiply the hourly value . . . by a weighted factor of three"). *See also Fried v. Utilities Leasing Corp.*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,965 ("the contingent nature of the case and the outstanding quality of the work performed, including the result obtained, justified a fee at the very minimum of four times the attorneys' hourly rates"); *Arenson v. Board of Trade*, 372 F. Supp 1349, 1358 (N.D. Ill. 1974) ("under the unique circumstances of this litigation and the significant result achieved it is clear to this court that an award of four times the petitioning attorneys normal hourly rate is proper and just").

In the cases cited above, the multipliers were applied to the entire fee award, not just to selected portions of counsel's work. Thus, the district court's application of multipliers in this case demonstrates significant restraint. Although the court found as a fact that "the contingent nature of plaintiffs'

success has been apparent throughout this litigation" (Pet. App. 39a), the court awarded the multiplier of two only for Phases IV, V, and VII, "where likelihood of success was least," and an additional multiplier of two for quality only for Phase V.

The Commonwealth represents that the statements in support of the contingency factor were "conclusory," and "unsupported by any analysis." (Comm. Brief at 21-22). This argument is disingenuous. The district court's statements, wrenched out of context by the Commonwealth, may well appear inadequate. However, in the context of a forty page analysis of the work done in all phases of the litigation, the difficult and unresolved legal questions, and the Commonwealth's extreme recalcitrance, the district court's explanation is perfectly clear and fully supported by the entire record in the case. It would be simply redundant to restate details that were incorporated into the court's entire analysis.

Contrary to the Commonwealth's argument, the district court did not rely on the general conclusions quoted above but described the factors that made the risk of not prevailing in Phases IV, V, and VII especially significant. The court specifically noted that in these phases of the litigation the "eventual implementation of the I/M Program seemed least likely." (Pet. App. 40a). The court also emphasized that the litigation had been undertaken originally "against the U.S. Government and the Commonwealth of Pennsylvania." (Pet. App. 39a). That the nature of the defendant and the resources available to it were important factors in the court's assessment of the risk was readily apparent. The court noted the "intense adversarial atmosphere" and the Commonwealth's dominant policy of delaying compliance with the letter and spirit of the consent decree. (Pet. App. 9a).

The court also emphasized the constant battle that was necessary to defend DVCCCA's and the public's rights that commenced "in Phase IV and [is] continuing up to the present." (Pet. App. 39a). The court specifically noted the recent introduction of a bill "into the Pennsylvania legislature

which, if enacted, would attempt to preclude payment of any counsel fees awarded in this litigation" despite the existence of the Clean Air Act. (Pet. App. 9a). The court's specific reference to the duration of the Commonwealth's resistance to compliance with the law merely echoed the finding that Phase IV involved "matters that could have delayed the implementation of the I/M Program beyond an acceptable period." (Pet. App. 25a). Phase V involved a legislative attempt to prevent expenditure of any state funds for the program, creating a direct clash between the state legislature and the federal court, the outcome of which was extremely uncertain. (Pet. App. 39a). Phase VII involved attempts by the Commonwealth, with support of the federal government, to carve out exceptions to the contempt sanction issued by the district court in Phase V. (Pet. App. 32a). The court thus clearly set out several specific factors that made success on the merits of this litigation highly contingent and that demonstrated the extreme uncertainty whether attorneys' fees would ever be recovered from the Commonwealth.

Similarly, the additional multiplier of two for quality was applied only to Phase V, for which the district court specifically found that plaintiffs' work was "superior" and "culminated in an outstanding result." (Pet. App. 39a). The court further stated that plaintiffs' work was helpful not only to the district court but also the court of appeals in resolving an unusually difficult and sensitive issue (Pet. App. 39a), a conclusion that was echoed by the court of appeals. (Pet. App. 65a-67a).

The court also detailed the work DVCCCA's attorneys did in Phase V, from actions in the district court to motions before this Court. (Pet. App. 17a-38a). That this was a most crucial phase of the litigation, and one in which the success obtained was exceptional, is self-evident from the district court's finding that before the contempt sanction was imposed, the Commonwealth had simply "ceased all efforts toward implementing the I/M Program." (Pet. App. 5a). Had not the court been able to develop an innovative sanction, one

which had teeth yet which would respect the essential elements of state sovereignty — a process the work of DVCCCA's attorneys aided considerably — there might well never have been an I/M Program. The court thus clearly set forth a sufficient factual basis for the appellate court to see that the awarding of a multiplier based on quality was certainly well within the lower court's discretion in this phase of the litigation.

In *Blum*, this Court noted that the "District Court, having tried the case, was in the best position to conclude that the quality of representation was high." 465 U.S. at 899. This Court has often stated that the district court has a "superior understanding of the litigation." *Hensley*, 461 U.S. at 437. Thus, the district court "necessarily has discretion" to evaluate the considerations that may lead to an upward adjustment of the fee, including the important factor of "the results obtained." *Id.* at 433. Particularly in this case, in which, as the court of appeals noted, the district court's findings were based on its nine years of intimate involvement with the litigation (Pet. App. 54a), its findings should be accorded substantial deference. The duration of the court's experience with the case attests to its ability to assess both the quality of counsel's work and the risk of not prevailing in each phase of the case.

In *Blum*, this Court rejected the upward adjustment based on quality because there was no evidence in the record to support it. In the present case, in contrast, there was ample evidence to support the district court's finding that the work in Phase V was superior. Moreover, both the district court and the court of appeals were in a position to evaluate the quality of DVCCCA's work, and both concluded that an upward adjustment was fully justified. Since this superior work was not reflected in the basic hourly rate or the number of hours allowed, the upward adjustment for quality in Phase V was clearly correct and should be affirmed by this Court.

V. UNDER THE CIRCUMSTANCES OF THIS CASE, THE DISTRICT COURT PROPERLY AWARDED ATTORNEYS' FEES FOR COMMENTING ON REGULATIONS AND SUBMITTING COMMENTS AT A PUBLIC HEARING.

Finally, the Commonwealth attacks the district court's award of attorneys' fees to DVCCCA's attorneys for work done in connection with the submission of comments to draft regulations (Phase II) and participation at a public hearing on the 1982 state implementation plan (part of Phase IX). In *Hensley*, the Court emphasized that the award of attorneys' fees necessarily depends on the facts of each case and that the exercise of discretion by the district court must be respected. 461 U.S. at 436-37. In this case, the district court specfically noted that the case "required constant monitoring of the consent decree both by the court and plaintiffs in order to ensure compliance by defendants with both the letter and spirit of the decree as well as to protect the plaintiffs' and the public's rights under the decree." (Pet. App. 9a). Under these circumstances, the award of fees for work in related administrative proceedings was entirely proper.

Several courts of appeals have expressly held that post-judgment monitoring activities may be compensable. *See, e.g., Garrity v. Sununu*, 752 F.2d. 727, 738 (1st Cir. 1984); *Miller v. Carson*, 628 F.2d 346, 348 (5th Cir. 1980); *Northcross v. Board of Education*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Bond v. Stanton*, 630 F.2d 1231, 1233 (7th Cir. 1980). These courts have correctly recognized that reasonable monitoring is often necessary to secure compliance with a court's order and that such service is as crucial to obtaining adequate relief as the activities involved in obtaining the order. In *Garrity, supra*, the court noted that extreme tension and animosity are not preconditions for an award for post-judgment monitoring and upheld the award even in the context of a "constructive atmosphere" between the parties. 752 F.2d at 738. The present case involves the extra element of tension and animosity that makes the award even more

justified. The Commonwealth's relentless attempts to circumvent the requirements of the consent decree by every means available to it, including promulgation of inadequate regulations and seeking the EPA's collaboration in delaying implementation of the program, necessitated monitoring of and participation in these administrative proceedings.

This Court has recently considered the question of a district court's discretion to award attorneys' fees for related administrative proceedings in *Webb v. Board of Education*, ___ U.S. ___, 105 S. Ct. 1923 (1985). Although *Webb* considered administrative proceedings that occurred before the filing of a complaint rather than activities that followed a consent decree, similar considerations apply to the question of whether such work should be compensated. Presented with a clear opportunity in *Webb* to rule that attorneys' fees could not be properly awarded for work in related administrative proceedings, the Court declined to do so. Instead, the Court "re-emphasize[d] that the District Court has discretion in determining the amount of the fee award." ___ U.S. at ___, 105 S. Ct. at 1929, *quoting Hensley*, 461 U.S. at 437. In *Webb*, the Court affirmed the district court's decision not to compensate the administrative work because the record did not support such compensation:

> The petitioner made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of the type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement.

___ U.S. at ___, 105 S. Ct. at 1929. Thus, the Court implied that evidence of the usefulness and necessity of the work product in the administrative proceedings to advance the litigation would have produced a different result.

Applying the standard articulated in *Webb* to the fees awarded in this case for work in related proceedings, it is clear that the district court was well within its discretion in awarding the fees for work in Phases II and IX. This work was necessary to monitor the Commonwealth's performance

under the consent decree and to insure compliance. Particularly in light of the Commonwealth's repeated attempts to circumvent the requirements of the consent decree, which the district court recounted in detail in its opinion, this monitoring and participation in regulatory proceedings was essential to protect DVCCCA's rights under the consent decree. The district court specifically so found.

With respect to the submission of comments on the regulations published in the Pennsylvania Bulletin on September 20, 1979, the district court found:

> The publishing of the regulations was required under the consent decree. While it is true that the opportunity to submit comments to the proposed regulations was available to any person, it does not follow, as defendants contend, that plaintiffs should not be compensated for the time used in preparing comments. Plaintiffs had an interest in the regulations since they were a party to the consent decree. Their interest was based on a desire to assure compliance with the consent decree and to protect their rights thereunder. The usefulness of plaintiffs' comments was manifested in the revisions that were made to the original proposed regulations.

(Pet. App. 17a). Thus, with respect to Phase II, the district court made specific factual findings that this activity was both useful and necessary to advance the litigation and protect the rights at issue. Moreover, in effecting revisions to the proposed regulations, DVCCCA helped to prevent further litigation that would have resulted from the promulgation of inadequate regulations.

In Phase IX, DVCCCA participated in Environmental Protection Agency ("EPA") hearings during which the Commonwealth requested that EPA modify the state implementation plan so that the I/M Program would cover a smaller geographic area, and proposals of cutoffs of EPA funding were discussed. The Court denied attorneys' fees for participation in hearings concerning the possible cutoff of federal funds because such hearings were not sufficiently related to

DVCCCA's rights under the decree. The district court awarded fees only for activities resulting directly from the Commonwealth's request for a modification of the I/M Program based on its finding that an EPA modification of the program would have affected DVCCCA's right under the consent decree. (Pet. App. 36a). Therefore, the activities were both useful and necessary in the context of the litigation.

The Commonwealth argues that these activities should not be compensated because they are equally available to the general public. The Commonwealth also argues that such comments to regulations tend to be technical rather than legal in nature. These arguments miss the point. While it is true that opportunities to comment are available to the general public, DVCCCA's special interest in these activities and the real possibility that the actions of the Commonwealth with respect to them would directly affect their rights under the consent decree make the activities of their attorneys a vital part of the litigation and inseparable from the purpose it served. Moreover, while some comments may have been technical in nature, those submitted by DVCCCA were prepared in the context of the consent decree with an eye to enforcing the legal rights it provided. Thus, participation in these administrative activities was essential to the vindication of DVCCCA's rights under the consent decree, and the compensation for these activities was entirely proper and well within the range of the district court's discretion.

VI. BECAUSE THE DISTRICT COURT STRUCTURED ITS FEE AWARD BEFORE *BLUM*, THIS COURT SHOULD TAKE INTO ACCOUNT ALL OF THE ADJUSTMENTS TO THE REQUESTED FEE AND NOT MERELY THE USE OF MULTIPLIERS.

Both Pennsylvania and the United States would have this Court believe that the district court committed a simple error in applying multipliers to the lodestar it established and that the lodestar itself represented the reasonable attorneys' fee

that Congress contemplated in 42 U.S.C. § 7604(d). Nothing could be further from the truth.

However counsel may conceptualize the process of setting an attorneys' fee, common sense indicates that a judge must have some sense of the value of the legal work that has been done before him and must recognize that the final fee will represent the product of three interrelated variables: hours, hourly rates, and adjustments.

Thus, for example, the contingency factor — the possibility that Pennsylvania might simply face down a federal court through massive resistance as it attempted to do here — could have been reflected either in higher hourly rates, because lawyers demand higher rates when they are likely to be paid neither promptly nor at all, or in market rates for noncontingent work and a multiplier to reflect the same considerations. Similarly, the determination that counsel's work in a case is superior bears some relation to both hourly rates and how much time counsel devoted to the task. The work in Phase V was superior precisely because the district court not only applied a low hourly rate but also halved the hours — and then marveled at how much counsel had accomplished in so little time and how well it was done. The same result would have been achieved if the district court had both increased the lodestar in this difficult phase and recognized that merely human lawyers had indeed spent a substantial amount of time to accomplish their important task.

Had the district court had the benefit of the *Blum* opinion, it might well have applied the contingency factor in setting rates or allowing additional compensated hours instead of as the basis for a multiplier. It might likewise have been leary of multipliers for superior work and have figured the fee on the basis of higher rates and all the hours worked rather than on what it viewed as a smaller number of low rate, extraordinarily productive hours. But the record makes it clear that the fee was a reasonable one taking all three variables into account, and this Court should affirm the decision

below on that basis even if it would not accept DVCCCA's arguments, which we believe are absolutely correct, in the earlier sections of this brief.

In *Garrity v. Sununu*, 752 F.2d 727, 739-40 (1st Cir. 1984), the court faced a similar challenge to an upward adjustment for quality that had been determined before *Blum*. Recognizing that the lower court lacked the guidance of *Blum*, the court sustained the upward adjustment, although it acknowledged "that under *Blum* certain of the qualities sought to be recognized by the bonuses might better have been recognized by means of more adequate hourly rates." The same result is appropriate here. *See also Clayton v. Thurman*, 775 F.2d 1096, 1099 (10th Cir. 1985) ("although *Blum v. Stenson* . . . was not decided until after the trial court made its award [which included an enhancement for quality], we do not find that the trial court did violence to the teaching of *Blum*").

Nevertheless, if the Court were to conclude, contrary to our arguments, that *Blum* makes it impossible to affirm the decision below because the district court's pre-*Blum* findings insufficiently anticipate the *Blum* analysis, then the proper course would be to vacate the grant of certiorari as improvident. The interpretation of *Blum* should properly be resolved on a post-*Blum* record in which the hourly rates and number of hours were not calculated in anticipation of the application of the multipliers.

Finally, if the Court is prepared neither to affirm nor to vacate the writ of certiorari as improvidently granted, the only appropriate relief would be to vacate the decision of the court of appeals and to remand with orders that that court further remand the matter to the district court with orders that it redetermine the attorneys' fee *ab initio* in light of *Blum*. Any other course would leave DVCCCA with only the fee which the district court reduced in expectation of the application of multipliers — plainly not the reasonable attorneys' fee contemplated by Congress.

CONCLUSION

For the foregoing reasons, DVCCCA respectfully requests that this Court affirm the district court's award of attorneys' fees in all respects. Specifically, DVCCCA respectfully requests that the Court rule that the risk of not prevailing may be used as a factor in increasing the basic fee award, that a district court has discretion to increase an award based on the superior quality of the work where it is not reflected in hourly rates, and that fees for necessary related administrative proceedings may be awarded under proper circumstances.

Respectfully submitted,

James D. Crawford
Joyce S. Meyers
William J. Maffucci
Attorneys for Delaware Valley Citizens' Council for Clean Air, et al.

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103
215-751-2162

Of Counsel.

January 11, 1986.

REPLY

BRIEF

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NO. 85-5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER COMMONWEALTH OF PENNSYLVANIA

JAY C. WALDMAN
General Counsel

HENRY G. BARR
Executive Deputy
General Counsel

SPENCER A MANTHORPE
Chief Counsel
Department of
Transportation

JOHN M. HRUBOVCAK
Assistant Counsel
Department of
Transportation

JOHN P. KRILL
Deputy General
Counsel

Attorneys for Petitioners

Office of General
Counsel
Commonwealth of PA
Post Office Box 11775
Harrisburg, PA 17108
(717) 783-6563

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REPLY BRIEF OF PETITIONER COMMONWEALTH OF PENNSYLVANIA

THE ADJUSTMENTS BY THE DISTRICT COURT TO DELAWARE VALLEY'S BASIC FEE REQUEST ARE UNRELATED TO ITS USE OF MULTIPLIERS AND CANNOT NOW BE USED TO JUSTIFY THEM.

Delaware Valley suggests at pp. 37-39 of its brief, that, had the District Court had the benefit of this Court's opinion in Blum v. Stenson, 465 U.S. 886 (1984), it might have allowed additional compensated hours as a substitute for the use of multipliers. It then suggests that the District Court reduced the basic fee in expectation of the application of multipliers and, should all its other arguments fail, that this case should therefore be remanded to the District Court for redetermination of attorneys' fees ab initio.

This Court determined in Blum what is in essence a two-step method of calculating attorney fees. In the present case, the District Court calculated the basic fee award by determing the reasonable

number of hours and the reasonable hourly rate (Pet. App. 8a). Delaware Valley concedes that the District Court properly followed this two-step process (Delaware Valley's Brief at 8). Delaware Valley sought no appellate review of this basic fee award, except for two items which were appealed to the Court of Appeals, resolved against it there (Pet App. 59a-62a), and not pursued further. Thus it has not preserved the issue of the basic fee award for consideration by this Court and cannot raise it now.

Having conceded that the District Court followed the two-step procedure, and failing to preserve any argument on the basic attorney fee, Delaware Valley makes a contradictory argument (Delaware Valley's Brief at 8 and Argument VI) that the District Court should be allowed to recalculate the hours and the hourly rates because the District Court established

these rates and hours in the lodestar anticipating the application of a multiplier. Of course, this is error in that the District Court first calculated the reasonable number of hours and the reasonable hourly rate, in accord with the first step of the two-step process (Pet App. 8a). Delaware Valley argues that, if the award of the multiplier is reversed, the lower courts be given the option of concealing this multiplier by simply increasing the reasonable number of hours or the reasonable hourly rate to arrive at the dollar figure.

This is a clear distortion of the law by Delaware Valley whereby it is in conflict with the opinions of this Court and whereby it seeks to re-litigate an issue that it has not preserved. Moreover, it is clear on the record that the District Court could not in conscience make this redetermination in view of its

express finding that the hours it eliminated were unnecessary, duplicative, inadequately documented, and of uncertain significance (Pet. App. 26a, 28a). Accordingly, there is no reason to resubmit the case to the lower court.

CONCLUSION

For these reasons and those set forth in our initial brief, the decision should be reversed.

Respectfully submitted,

JAY C. WALDMAN
General Counsel

HENRY G. BARR
Executive Deputy
General Counsel

SPENCER A. MANTHORPE
Chief Counsel
Department of
Transportation

JOHN M. HRUBOVCAK
Assistant Counsel
Department of
Transportation

JOHN P. KRILL
Deputy General Counsel
(Counsel of Record)

Attorneys for Petitioners

Office of General Counsel
Commonwealth of Pennsylvania
Post Office Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

AMICUS CURIAE

BRIEF

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(8)

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Appeals for the Third Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

ARIZONA, CONNECTICUT, GEORGIA, GUAM, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WYOMING

FRANCIS X. BELLOTTI
Attorney General
Commonwealth of Massachusetts

SUZANNE E. DURRELL
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-1007
Counsel of Record

(see inside front cover
for additional counsel)

49 pp

ROBERT K. CORBIN, Attorney General
State of Arizona

JOSEPH I. LIEBERMAN, Attorney General
State of Connecticut

MICHAEL J. BOWERS, Attorney General
State of Georgia

RICHARD G. OPPER, Attorney General
Territory of Guam

CORINNE K.A. WATANABE, Attorney General
State of Hawaii

JIM JONES, Attorney General
State of Idaho

NEIL F. HARTIGAN, Attorney General
State of Illinois

LINLEY E. PEARSON, Attorney General
State of Indiana

DAVID L. ARMSTRONG, Attorney General
State of Kentucky

WILLIAM J. GUSTE, JR., Attorney General
State of Louisiana

JAMES E. TIERNEY, Attorney General
State of Maine

STEPHEN H. SACHS, Attorney General
State of Maryland

(see inside back cover
for additional counsel)

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No. 85-5

IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA, et al.,

Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR, et al.,

Respondents.

On Writ of Certiorari to
the United States Court of
Appeals for the Third Circuit

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Section 304(d) of The Clean Air Act and numerous other federal laws provide for a court award of a "reasonable"

attorney's fee. Since similar statutory fee provisions are to be interpreted pari passu and the same standards are generally applicable in all such cases, see, e.g., Ruckelshaus v. Sierra Club, 463 U.S. 680, 691-92 (1983), the court of appeals' decision under Section 304(d) will affect fee awards under other statutes.

One can hardly conceive of a less socially valuable use of resources than attorneys' fees litigation. State and federal taxpayers are now routinely treated to the spectacle of litigation over fees to be paid by publicly-funded agencies, defended by publicly-funded attorneys, and decided by publicly-funded courts. It is the firm belief of the amici States that the lack of reasonable and predictable standards governing the

application for and adjudication of fee awards has unnecessarily encouraged unreasonably high requests, stymied settlement efforts, and forced these matters into litigation.[1/]

Thus, the interest of the amici States in this case, one which they share with all state and local governments, is in the removal of the major "wild cards" in the calculation of "reasonable" attorney's fees awards. Although the Court's

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1/ The States continue to seek resolution of these matters through Congress. See generally The Legal Fee Equity Act: Hearing on S. 2802 Before the SubComm. On the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 234-356 (1984) (statements and materials submitted by Francis X. Bellotti, Attorney General of Massachusetts, Steve Clark, Attorney General of Arkansas, and David L. Wilkinson, Attorney General of Utah).

decision in Blum v. Stenson, 104 S. Ct. 1541 (1984), narrowed the availability of upward adjustments in fee awards under 42 U.S.C. § 1988 for quality of representation and results obtained, the Court deferred consideration of one of the last remaining major "wild cards"--upward adjustments in the lodestar based on the contingent nature of the underlying litigation. See Blum, supra, at 1550 n. 17. That issue is squarely presented by this case.

The elimination of such adjustments would render the application of the fee award provisions of the Clean Air Act, civil rights statutes, and numerous other similar fee award laws more certain, predictable, and consistent. With predictability will come reasonableness. Greater certainty would promote settle-

ment, reduce litigation, and permit counsel on both sides to devote more attention to substantive matters, all to the benefit of the individuals Congress has identified for special protection.

SUMMARY OF ARGUMENT

I. Section 304(d) of the Clean Air Act was intended to encourage private enforcement of the Act by removing financial impediments to litigation as well as to deter frivolous litigation. To achieve this purpose, Section 304(d) authorizes the district courts, in their discretion, to award to any party their "costs" of litigation, including a "reasonable" attorney fee. The statute must be construed narrowly to conform to

this limited purpose, especially since Section 304(d) is in derogation of the common law American Rule against fee shifting and may abrogate the States' sovereign immunity under the Eleventh Amendment.

Consideration of the contingent nature of success in the underlying case (i.e. the risk of losing and not receiving payment) in determining a "reasonable" attorney's fee is entirely inconsistent with the purposes of Section 304(d) and is not authorized by Congress. Rather, upward adjustments based on contingency are a judicially created concept conceived in contexts which are inapposite to Section 304(d).

The court of appeals' reliance in this case on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.

§ 1988, is misplaced, especially since that statute does not authorize consideration of contingency in determining a "reasonable" fee.

II. Even if the contingent nature of success in the underlying litigation were a proper consideration in determining a "reasonable" attorney's fee, it is subsumed in those factors used to calculate the lodestar (i.e., the reasonable number of hours spent times the reasonable hourly rate). Therefore, an upward adjustment in the lodestar for contingency constitutes impermissible "double counting" which results in a "windfall" to the attorney.

III. Furthermore, even if consideration of contingency is permitted and an upward adjustment on that basis does not constitute "double counting", such ad-

justments are not allowed where, as in the present case; plaintiffs are represented by a non-profit public interest law firm which does not bill its clients.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT AUTHORIZE CONSIDERATION OF THE CONTINGENT NATURE OF SUCCESS IN THE UNDERLYING LITIGATION IN DETERMINING A "REASONABLE" ATTORNEY'S FEE.

Section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), as amended, authorizes the court, in its discretion, to "award costs of litigation (including reasonable attorney and expert witness fees) to any party . . . ." The issue in this case is one of statutory construction--what constitutes a "reasonable" attorney's fee under Section 304(d)

and how should the amount of such a fee be determined.

The Clean Air Act itself provides no express answer to these questions. In applying a generally worded or ambiguous statute, courts should be guided by the reasons underlying the statute's enactment. United States v. Kimbell Foods, Inc., 440 U.S. 715, 738 (1979). Section 304(a) of the Clean Air Act provides for suits by private citizens against violators, including the United States and other governmental agencies or instrumentalities. See H.R. Conference Rep. No. 1783, 91st Cong., 2d Sess. 38, reprinted in 1970 U.S. Code Cong. & Ad. News 5374, 5388. Section 304(d), like numerous other fee-shifting statutes, was designed to encourage private enforcement by re-

moving financial barriers that might otherwise prevent access to the courts. Furthermore, by authorizing an award of costs against any party, Section 304(d) was designed to discourage frivolous litigation. Cf. H.R. Rep. No. 294, 95th Cong., 1st Sess. 28, reprinted in 1977 U.S. Code Cong. & Ad. News 1077, 1416 (legislative history of Section 307(f) of the Clean Air Act). See generally Ruckleshaus v. Sierra Club, 463 U.S. at 692-93 n. 13.

Since Section 304(d) is an exception to the common-law American Rule against fee-shifting, see Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 260-61 and n. 33 (1975), and since it may constitute an abrogation of the States' sovereign immunity under the

Eleventh Amendment,[2/] it should be construed narrowly, see 3 C. Sands, Sutherland Statutory Construction, § 61.01 (4th ed. 1974), and not enlarged beyond what a fair reading of the lan-

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2/ Compare Section 304(a) (authorizing suits against any person including the United States, and any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment) and Ruckleshaus v. Sierra Club, 463 U.S. at 685 (Section 307(f) of the Act is a waiver of the United States' immunity from claims for attorney's fees) with Hutto v. Finney, 437 U.S. 678, 693-700 (1978) and Maher v. Gagne, 448 U.S. 122, 130-33 (1980) (Eleventh Amendment does not bar award of fees under 42 U.S.C. § 1988--Congress has plenary power to set aside the States' immunity in order to enforce the Fourteenth Amendment). There is no issue of sovereign immunity in the present case since the court of appeals ruled that the petitioner waived its immunity by entering into a consent decree. See Delaware Valley Citizens' Council, Etc. v. Commonwealth of Pennsylvania, 678 F.2d 470 (3d Cir.) cert. denied, 459 U.S. 969 (1982).

guage requires. Ruckleshaus v. Sierra Club, 463 U.S. at 685-86.[3/]

A. Consideration of Contingency Is Contrary to the Purposes of Section 304(d) of the Clean Air Act.

In this case, the lower courts increased part of the lodestar by 100% and another part by 200% because of the contingent nature of success in the underlying case (i.e. the risk of losing the case and receiving no fee). Such upward adjustments are entirely inconsistent with the purposes of Section 304(d) for several reasons.

3/ Furthermore, the Court has cautioned that "the Eleventh Amendment . . . may counsel moderation in determining the size of the award," Hutto v. Finney, 437 U.S. at 692, n. 18, particularly where, unlike in that case, the amount of the award is "so large or so unexpected that it interfere[s] with the States budgeting process." Id.

First, such adjustments are, by definition, "unreasonable" since the result is that parties are reimbursed over and above their "costs" of litigation as comprehended by Section 304(d). As noted by the United States Court of Appeals for the Sixth Circuit in a school desegregation case, "[m]ultiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve [the] goal" of attracting competent counsel. Oliver v. Kalamazoo Board of Education, 576 F.2d at 716. Anything more than that is simply "unearned personal gain at the public expense." Northcross v. Board of Education, 611 F.2d 624, 638 (6th Cir. 1979), cert. denied, 447 U.S.

911 (1980).[4]

Second, even where some rationale is given by the court for awarding an upward adjustment, the amount of the adjustment is entirely arbitrary,[5] thus violating Congress' mandate that fee awards be "reasonable." For example, in the present case the district court supported its decision to increase one part of the lodestar by 100% and another part by 200%, thus adding $124,199.50 onto the lodestar of $85,613.50, with a mere three paragraphs of unsupported and conclusory findings. Pet. App. at 39a-40a.

4/ See also Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 292, 317-18, 324 n. 167 (1977); Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651, 675.

5/ See, Berger, supra note 4, at 290.

Even courts that have endorsed the use of such adjustments under other attorney's fee statutes have commented on the subjectivity of arriving at a precise amount.[6]

The arbitrary nature of such awards is exacerbated by the fact that a difference between an adjustment of, for example, 10% and one of 25% can result in a difference of hundreds of thousands of

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6/ See, e.g., Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 26-27 (D.C. Cir. 1984) ("In most cases the chances of winning could not be set with anything approaching mathematical precision, and so vast increases in attorneys [fees] would derive from a spurious mathematical base."); National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1328 (D.C. Cir. 1982) (amount of bonus "inherently imprecise"); Foster v. Gloucester County Board of Chosen Freeholders, 465 F. Supp. 293, 302 (D. N.J. 1978).

dollars in protracted case.[7] In Hall v. Borough of Roselle, 747 F.2d 838 (3rd Cir. 1984), an upward adjustment of 50% by the district court translated into an additional $5,000 while in Stenson v. Blum, 512 F. Supp. 680 (S.D.N.Y.), aff'd, 671 F.2d 493 (2d Cir. 1981), aff'd in part and rev'd in part, Blum v. Stenson, 104 S.Ct. 1541 (1983), a 50% upward adjustment by the district court translated into an approximately $40,000 add-on. In New York Association for Retarded Children v. Carey, 544 F. Supp. 330 (E.D.N.Y. 1982), rev'd, 711 F.2d 1136 (2d Cir. 1983), a lower percentage upward adjustment (25%) by the district court resulted in an additional award of $411,864.11. Indeed, by using percentage figures rather than dollar figures, the

7/ See Berger, supra note 4 at 291.

upward adjustments and, thus, the total awards are skewed and bear no rationale relationship to the risks supposedly assumed by the lawyer or the incentive such a lawyer allegedly would require to accept such a case.

This lack of consistency and predictability in upward adjustments is directly contrary to Congress's purpose of ensuring uniformity and consistency in fee awards.[8] Furthermore, as a practical matter, the unpredictability of such adjustments makes it difficult for the parties to settle fee claims, since the prospect of an upward adjustment makes it impossible to estimate, with any degree of accuracy, the total amount of

8/ Cf. Legislative History of Section 1988, 122 Cong. Rec. 35,118, 35,122 (Sieberling) (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) at 1.

fees a court would be likely to award in a particular case.[9]

Finally, the exorbitant fee awards that have resulted from the use of upward adjustments for contingency, including in the present case, certainly cannot be characterized as "reasonable" in amount.[10] See discussion supra at ___

9/ Cf. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.").

10/ The size of attorney's fees awards in general has brought harsh criticism from members of the public as well as the bench and bar. See, e.g., City of Riverside v. Rivera, 54 U.S. L. W. 3143, 3144 (September 10, 1985), cert. granted, 54 U.S.L.W. 3263 (October 22, 1985) (In Chambers Opinion by Rehnquist, J.) ("The billing experience I gained in 16 years of private practice strongly suggests to me that a very reasonable client might

(footnote continued)

and n. 28, infra.

An examination of the justifications offered by courts in support of an upward adjustment based on contingency or risk reveals that those justifications are fallacious and inconsistent with the overall purposes of Section 304(d) and other similar fee shifting statutes.

The concept of such upward adjustments originated in antitrust cases re-

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(footnote continued)

seriously question an attorney's bill of $245,000 for services which had resulted solely in a monetary award of less than $34,000."); Alpine Pharmacy, Inc. v. Pfizer, 481 F.2d 1045, 1050 (2d Cir.), cert. denied, 414 U.S. 1092 (1973) ("lucrative fees involved in recent class actions may evoke public acceptance of an Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden'.").

sulting in the creation of an equitable fund from which both plaintiffs and their counsel recover.[11/] In awarding fees in such cases, "the court exercises its equitable jurisdiction over the relationship between an attorney and his amorphous client." Prandini v. National Tea Co., 557 F.2d 1015, 1020 (3rd Cir. 1977).[12/] The rationale for fee awards

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11/ See, e.g., Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) (Lindy I); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3rd Cir. 1976) (Lindy II); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

12/ Courts have a duty "to protect against 'vicarious generosity' . . . [so that] a successful plaintiff does not have its treble damage recovery unduly diminished by the payment of fees to its attorneys." International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1274-76 (8th Cir.), cert. denied, 449 U.S. 1063 (1980) (upward adjustment struck down on that ground).

in such cases is one of quantum meruit--"the members of the [benefited] group should pay 'compensation as was reasonable' . . . to the attorney representing their interests." Grinnell, 495 F.2d at 469; Lindy I, 487 F.2d at 165.

By contrast, Section 304 authorizes only equitable relief, not damages. Cf. Oliver v. Kalamazoo Board of Education, 576 F.2d 714, 715 (6th Cir. 1978) (in school desegregation cases which seek injunctive relief, upward adjustment is not appropriate under 20 U.S.C. § 1617). Moreover, fee awards are paid not by the party who benefits from the judgment but by the defendant (or other party), in addition to the costs of complying with

the judgment against him.[13/]

The roots of the concept of an upward adjustment can be found in the contingent fee agreements that often obtain between tort plaintiffs and their attorneys. In those circumstances, a contingent fee arrangement has "an economic rationale: it compensates plaintiff's lawyer for his services as an entrepreneur who bears the risk of litigation." Leubsdorf, infra note 14, at 480. By taking a number of cases on a contingency basis, plaintiff's counsel can use the large fees recovered in successful cases to cover the losses he incurs in unsuccessful ones. Such arrangements thus have the purpose and effect of financing not only meritorious but also losing cases.[14/]

13/ Nor can an upward adjustment under Section 304(d) be characterized as part of the party's equitable "punishment" for legal wrongs. See Berger, supra, note 4 at 317-18. Cf. Hutto v. Finney, 437 U.S. at 695 (fee award under § 1988 not intended to "compensate the plaintiff for the injury that first brought him into court"). This is especially so because the fee award often must be paid by a state or other public entity rather than by a private party, and the taxpayers who ultimately bear the burden of such awards are not guilty of any wrongdoing. See supra note 3 and accompanying text. See also Oliver v. Kalamazoo Board of Education, 576 F.2d at 716-18 (Weick, J., concurring) (100% upward adjustment for contingency and quality of work "not only excessive, but . . . unconscionable as well" where fee to be paid by state taxpayers); Keyes v. School District No. 1, 439 F. Supp. 393, 414-15 (D. Colo. 1977); Thomas v. Board of Education, 505 F. Supp. 102, 104 (N.D. N.Y. 1981); Brewster v. Dukakis, 544 F. Supp. 1069, 1082 (D. Mass. 1982).

14/ Copeland v. Marshall, 641 F.2d 880, 913 (D.C. Cir. 1980) (Copeland III) (Wilkey, J. dissenting); Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L. J. 473, 474 (1981) ("The current theory of contingency bonuses implies that lawyers and clients should be made as willing to bring a feeble suit as a promising one."); id. at 491-92.

Such a purpose and effect are entirely inconsistent with those of Congress in enacting Section 304(d) and other similar fee award statutes. By permitting "citizen suits" yet allowing an award of fees against any party under Section 304(d), Congress sought "not only to discourage frivolous litigation but also to encourage litigation which will assure proper implementation and administration of the act . . . ." H.R. Rep. No. 294, 95th Cong., 1st Sess. 28, reprinted in 1977 U.S. Code Cong. & Ad. News 1077, 1416 (legislative history of § 307(f) of the Clean Air Act).15/

15/ Similarly, Congress intended Section 1988 to encourage and provide compensation for meritorious and successful cases while deterring frivolous and meritless suits. See 122 Cong. Rec. 35,118, 35,125 (Sieberling) (1976); 121 Cong. Rec. 26,806 (1975) (Tunney); H.R. Rep. at 6-8;

(footnote continued)

See also Ruckleshaus v. Sierra Club, 463 U.S. at 692-93 n. 13. As the Court said recently with respect to another fee award provision of the Clean Air Act (Section 307(f)), "One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits." Ruckelshaus v. Sierra Club, 463 U.S. at 693. See also Hensley, supra, 461 U.S. at 435.

For these reasons, the United States Court of Appeals for the District of

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(footnote continued)

S. Rep. No. 1011 at 5, 94th Cong., 2d Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908; Hensley v. Eckerhart, 461 U.S. at 446 (Brennan, J., concurring in part, dissenting in part).

Columbia has concluded that, in an employment discrimination case:

> To multiply all awards to account for the risk of losing would ultimately generate a pool of legal fees sufficient to compensate all attorneys bringing all civil rights suits; the fund generated would differ from insurance only in the manner in which it was collected and distributed.

Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 27 and n. 137 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 3488 (1985). While such a result is "arguably desirable, it is clearly not the one adopted by Congress" since there is "no provision for compensating losing, unrelated claims in the same case, or other losing cases which might or might not involve the same parties." Id. at 27-28. Accord Murray

v. Weinberger, 741 F.2d 1423, 1430-31 (D.C. Cir. 1984).[16]

For similar reasons, the United States Court of Appeals for the Seventh Circuit has rejected upward adjustments based on risk or contingency in civil right suits:

> The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits . . . Suppose a plaintiff asks for and receives a multiplier of 2 because he had a 50 percent chance of losing the case. This means that if the plaintiff's lawyer tries 10 such cases and wins 5 (as one would expect, if the risk of loss is indeed 50 percent), he will be paid as if he had won them all; that is, he will be paid twice his normal charge for each of the 5 cases

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16/ "[I]f [unsuccessful] litigation is to be subsidized, one may well ask why the subsidy should come from the defendant in another [successful] case." Leubsdorf, supra, note 14, at 488-89.

> he won, to compensate him for getting nothing in the 5 cases he lost.

McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984).

Contingency adjustments have the further untoward effect of rewarding, and hence encouraging, marginal claims to an even greater extent than clearly successful ones, since, logically, the amount of a contingency adjustment should vary inversely with the strength of a plaintiff's claim: "Indeed, if the logic of the risk multiplier were applied consistently, the attorney's fee would be larger the riskier the case, even though this would mean rewarding lawyers for flooding the courts with unmeritorious litigation, something we very much do not need." McKinnon v. City of Berwyn, 750 F.2d at 1392. Accord Laffey v.

Northwest Airlines, Inc., 746 F.2d at 26-27; City of Detroit v. Grinnell Corp., 495 F.2d at 471 ("[t]he greater the probability of success . . . the less this consideraton should serve to amplify the basic . . . fee"); Prandini v. National Tea Co., 557 F.2d at 1020.

Awarding adjustments on the basis of contingency is patently unfair since parties pay higher attorney's fees where they had a strong, but ultimately unsuccessful, case than where their violations of the law were clear from the outset.[17/] Such awards cannot serve to

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17/ Laffey, supra, 746 F.2d at 26 ("The award would be greatest when the losing party was the most unreasonable . . . creating a perverse penalty for those least culpable."); Leubsdorf, supra note 14, at 488-89. ("It is ludicrous for violators with a relatively good case to have their payments multiplied while those of flagrant violators are not.").

deter egregious violations by potential defendants since defendants are "penalized" only where it is unclear, prior to litigation, that their conduct is illegal.[18]

In addition, in opposing contingency adjustments, defendant's counsel, as in the present case, is put in the awkward and unseemly position of arguing that his client's liability was so clear from the outset that there was little or no risk of loss.[19] Courts are put in

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18/ Rowe, supra note 4, at 656, 676 n. 115; Leubsdorf, supra note 14, at 490; Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Colum. L. Rev. 346, 375 (1980); Hughes v. Repko, 578 F.2d 483, 491 (3rd Cir. 1978) (Garth, J., concurring).

19/ See Aumiller v. University of Delaware, 455 F. Supp. 676, 683 (D. Del.

(footnote continued)

the difficult, if not impossible, position of retrospectively assessing the initial likelihood of success in a case which they have already decided in favor of the person seeking fees.[20]

(footnote continued)

1978), aff'd, 594 F.2d 854 (3rd Cir. 1979); Gonzales v. Van's Chevrolet, Inc., 498 F. Supp. 1102, 1106 (D. Del. 1980); Leubsdorf, supra note 14, at 483-84.

20/ See National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1328; Copeland III, 641 F.2d at 893; Berger, supra note 4, at 292; Leubsdorf, supra note 14, at 474.

B. The Lower Courts' Reliance On 42 U.S.C. § 1988 Is Misplaced Especially Since Consideration of Contingency Is Not Authorized In Determining A "Reasonable" Attorney's Fee Under That Statute.

Despite the fact that upward adjustments based on contingency are inconsistent with the purposes of Section 304(d), the court of appeals in the present case affirmed the district court's decision awarding upward adjustments of 100% and 200%. The court of appeals' decision was premised not on the Clean Air Act, but on "the jurisprudence regarding the calculation of reasonable attorneys' fees developed in connection with other attorneys' fees statutes--particularly § 1988 [of 42 U.S.C.] . . . ." Pet. App. at 52a. However, such upward adjustments

are not authorized by the language, legislative history, or purposes of Section 1988 either.

Section 1988 was passed by Congress approximately six years after Section 304(d) was passed. Like Section 304(d), Section 1988 is silent as to the means for determining a "reasonable" fee. Their purposes are similar -- to encourage enforcement of the law and enhance compliance by removing financial barriers to litigation. See generally Hensley v. Eckerhart, 461 U.S. 424; Ruckleshaus v. Sierra Club, 463 U.S. 680.

The House Report on Section 1988 refers only to the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), a Title VII case, as the standards for determining a "reasonable" fee. See

Hensley v. Eckerhart, 461 U.S. at 424, 429-30.[21/] The Senate Report states that the amount of fees awarded under Section 1988 is to "be governed by the same standards which prevail in other types of equally complex Federal litigation," and that the "appropriate stan-

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21/ "The 12 factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F. 2d, at 717-719. These factors derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106 (1980)." Hensley, supra, 461 U.S. at 430.

dards" are the twelve factors set forth in Johnson, supra. The Report further indicates that those factors were "correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975)." S. Rep. No. 1011 at 6, 94th Cong., 2d. Sess. 2. "These cases have resulted in awards which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." Id.

The sixth factor set forth in the Johnson case is "whether the fee is fixed or contingent." 488 F.2d at 718. This factor, which was derived from the American Bar Association's Code of Profes-

sional Responsibility, Disciplinary Rule 2-106,[22] id. at 719, does not refer to the risk that the lawyer would lose the case and, thus, not be paid by his client (or his adversary). Rather, it refers to whether a fee agreement existed between the lawyer and his client (providing for a fixed hourly fee, a fixed other fee, a contingent fee, or some combination of the three), and, if so, the effect such an agreement should have

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22/ Rule 2-106(A) provides that "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." Rule 2-106(B) provides that "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence is left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee." (emphasis added). The Rule then lists eight factors "to be considered as guides in determining the reasonableness of a fee," the last of which is whether the fee is fixed or contingent.

on the court's determination of a reasonable fee award. See 488 F.2d at 718.[23] There is simply no mention in Johnson of the contingent nature of the underlying litigation, the "factor" which was used in the present case to support upward adjustments of 100% and 200% in the lodestar (the presumptively reasonable fee). Indeed, while the Johnson court, after listing the twelve relevant factors, "voice[d] no observation or intimation as to the correctness of the amount awarded," 488 F.2d at 720, it admonished that:

> [C]ourts must remember that they do not have a mandate [under the Civil Rights Act of 1964] . . .

23/ Since Johnson the federal courts of appeals have taken different approaches to the issue of what effect a fee agreement should be given by a court in making an award of attorney's fees under Section 1988. See Hamner v. Rios, 769 F.2d 1404 (9th Cir. 1985) and cases cited.

> to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel . . . and to fairly place the economical burden of Title VII litigation.

Id. at 719.

Of the three other cases mentioned in the legislative history of Section 1988, only one makes even a passing reference to the contingent nature of the underlying litigation as a factor to be considered.

The Swann case lists nine "pertinent" factors in fixing fees, some of which are the same as and some of which are different from those listed in Johnson. One of these factors is whether the fee is fixed or contingent. 66 F.R.D. at

486. While finding no evidence of a contract between the plaintiffs and their attorneys for a set fee,[24/] the Swann court concluded that "reasonable fees should be granted regardless of whether the individual plaintiffs were obligated to pay any fees . . . and regardless of whether the attorneys were salaried employees of a legal aid agency." Id. After considering the nine factors listed by it, the court simply stated the amount of the award, without explaining how it was calculated.[25/] Id. The contingent

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24/ The court did take into account the fact that certain counsel had had some of their out-of-pocket expenses reimbursed, and that local counsel had been compensated on a nominal basis. 66 F.R.D. at 486.

25/ The amount awarded was substantially less than that requested by plaintiffs. The court explained the reduction by

(footnote continued)

nature of the underlying litigation was not considered.

The Davis case also recited some, but not all, of the Johnson criteria, 8 E.P.D. at 5048, and then simply stated the amount of the award arrived at by attempting "to balance the many relevant factors in as fair a way as possible." Id. at 5049. The court did not list the sixth Johnson factor or mention the contingent nature of the underlying litigation.

The Stanford Daily case applied "many of the factors listed in Johnson within a

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(footnote continued)

stating that although "[a]n award of fees in [the] amount [requested] would be reasonable, . . . I would prefer to err on the conservative side . . . because I do not wish to contribute unnecessarily to the overpricing of litigation in this or any other court." 66 F.R.D. at 486.

modified version of the framework offered in Lindy [Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973) (Lindy I)]."[26/] 64 F.R.D. at 682. The Stanford Daily case is the only one of those cited in the Senate Report which considered contingency of success in the litigation in arriving at a "reasonable"

26/ The Stanford Daily court found the Johnson test lacking in that "the Fifth Circuit's opinion does not indicate how a district court is to use the list, how a court is to attach a relative weight to the different factors in determining an award." 64 F.R.D. at 682. The Lindy method (which arrives at a "lodestar" by multiplying the number of hours worked times the average billing rate and then provides for an upward and downward adjustment based on certain factors) was found to be lacking as well, since "[t]he variable factors--the contingent nature of success and the quality of the attorneys' work oftentimes will be interrelated [and, therefore,] might unintentionally lead to an unecessary inflation of the attorneys' fees award." Id.

attorney's fee,[27] to reflect "the fact that the attorneys' compensation, at least in part, was contingent in nature." 64 F.R.D. at 686, 688. However, the Stanford Daily court expressed reservation about this method of computing fee awards, supra note 26, and the amount of the upward adjustment actually awarded in that case for contingency, quality of representation, and results obtained -- $1,000 out of a total award of $47,500

27/ However, it should be noted that the court calculated the lodestar (which was then adjusted for contingency) by multiplying the number of hours worked by the average billing rate. This is somewhat different from the approach set forth by this Court which is that the lodestar is calculated by multiplying the reasonable number of hours worked times a reasonable hourly rate. See Hensley, supra, 461 U.S. at 433-34; Blum, supra, 104 S. Ct. at 1543-44.

(or about 2%) -- is negligible by today's standards.[28]

Thus, even when interpreted in light of the legislative history of Section 1988, Section 304(d) falls far short of

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28/ For example, in Municipal Authority, Etc. v. Commonwealth of Pennsylvania, 527 F. Supp. 982 (M.D. Pa. 1981), a class action suit under the Federal Water Pollution Control Act, the court awarded a lodestar of $51,461 and an upward adjustment of 250 percent based on contingency and quality of work for a total award of $231,574.50. In New York Association for Retarded Children v. Carey, 544 F. Supp. 330 (E.D.N.Y. 1982), rev'd, 711 F.2d 1136 (2d Cir. 1983), a 25% upward adjustment by the district court under § 1988 amounted to an addition of $411,864.11 to the lodestar. In Rajender v. University of Minnesota, 546 F. Supp. 158 (D. Minn. 1982), an employment discrimination case, the district court awarded a lodestar of $539,170 for work on the merits and an upward adjustment of 200% for contingency and quality of work, for a total award of $1,617.510. In the present case the upward adjustments of 100% and 200% resulted in $124,199.50 being added onto the lodestar of $85,613.50.

evincing clear Congressional support for considering contingency in computing a reasonable attorney's fee.

II. THE CONTINGENT NATURE OF SUCCESS IN THE UNDERLYING LITIGATION IS SUBSUMED IN THE CALCULATION OF THE LODESTAR AND, THEREFORE, AN UPWARD ADJUSTMENT ON THAT BASIS CONSTITUTES "DOUBLE COUNTING" AND RESULTS IN AN IMPERMISSIBLE WINDFALL.

Even if consideration of the contingent nature of the case were permissible in determining a "reasonable" attorney's fee, it does not justify an upward adjustment in the lodestar (i.e. reasonable number of hours spent times a reasonable hourly rates) because it will already have been taken into account in calculating that lodestar. To allow such an adjustment would, therefore, be impermissible "double counting" which would artificially inflate the award and constitute a "windfall" to the attorney.29/

In Hensley v. Eckerhart, 461 U.S. 424 (1983), and Blum v. Stenson, 104 S. Ct. 1541 (1984), the Court recognized that those Johnson factors (see fn. 21, supra), which are subsumed in the initial calculation of hours reasonably expended

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29/ Given the countless possibilities for "double counting", however unintentional, it is especially important that lower courts clearly articulate the reasons for their awards and base those awards on specific, detailed findings of fact. Blum, supra, 104 S. Ct. at 1548; Hensley, supra, 461 U.S. at 437-40. See, e.g., Hall v. Bolger, 768 F.2d 1148, 1150-51 (9th Cir. 1985); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 264-65 and n. 25 (8th Cir. 1985). The amici States fully support the petitioner's argument that the lower courts' failed to do so in this case.

times a reasonable hourly rate should not be used as an independent basis for an upward (or downward) adjustment in a fee award under Section 1988. Blum, 104 S. Ct. at 1549-50; Hensley, 461 U.S. at 434 n. 9. Thus, the Court rejected upward adjustments based on complexity or novelty of issues, Blum, 104 S. Ct. at 1549, on quality of representation (except in a rare case where the fee applicant shows that the quality of service is superior to that one reasonably should expect in light of the hourly rates charged and that success was exceptional), id., or, in the usual case, on the results obtained. Id. at 1549-50.

Similarly, the contingent nature of the case also is subsumed in various of

the Johnson factors.[30/] If a case is risky, presumably it presents complex, novel or difficult issues of law or fact. See, e.g., City of Detroit v. Grinnell Corporation, 495 F.2d at 471; Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. at 484-85. Then, as recognized in Blum, the risk "presumably [will be] fully reflected in the number of billable hours recorded by counsel." 104 S. Ct. at 1548-49. While there may be a unique case where the attorney's special skill or experience will enable him to spend fewer hours on such a case than another

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30/ For example, the United States Court of Appeals for the First Circuit, in its recent decision in Wildman v. Lerner Stores Corporation, 771 F.2d 605, 612-14 (1st Cir. 1985), referred to several of the Johnson factors as relevant to a decision whether to adjust the lodestar upward.

attorney might, that quality of representation should be reflected in the reasonable hourly rate. Id. See also Stanford Daily v. Zucker, 64 F.R.D. at 682.

Quality of representation often will bear on the likelihood of success. A high caliber trial attorney who has been practicing for years may have a much better chance of winning a "risky" case than a lawyer who is fresh out of law school. Again, the compensation the lawyer receives on an hourly basis presumably will reflect this fact. So too, the skill required to perform the service will depend on the novelty and complexity of the case, and the time and labor required presumably will reflect the riskiness of the case just as it reflects novelty and complexity. The preclusion of other employment by the attorney, the

customary fee, the results obtained, and the experience, reputation and ability of the attorneys, all subsume considerations of risk and contingency.[31]

31/ Of course, one's likelihood of success in a given case can be dramatically affected by the trial judge who is assigned to the case, a factor which is not listed in Johnson and which is difficult to quantify but which is nevertheless formidable. This "factor" is dramatically illustrated by the case of Swann, supra. In that case the district court, in discussing the difficulty and novelty of the case (and, implicitly, the likelihood of success), candidly admitted:

> The first and greatest hurdle was the district court. The judge, who was raised on a cotton farm which had been tended by slave labor in his grandfather's time, started the case with the uninformed assumption that no active segregation was being practiced in the Charlotte-Mecklenburg schools, that the aims of the suit were extreme and unreasonable, and that a little bit of push was all that the Constitution required of the court. The plaintiffs . . . demonstrated

(footnote continued)

Even the sixth Johnson factor--whether the fee is fixed or contingent--may subsume considerations of risk. If the lawyer has a fee agreement whereby the client will pay up to a certain amount of fees, the lawyer's risk is reduced. See, e.g., Murray v. Weinberger, 741 F.2d at 1431-32; National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1328. If an attorney has a contingent fee contract with his client entitling him to a certain

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(footnote continued)

> that segregation in Charlotte was no accident and that it was still the systematic practice of the school administration and the community at large . . . . and they produced a reversal in the original attitude of the district court.

66 F.R.D. at 484-85.

percentage of any damages award (even in a case seeking injunctive relief and damages), he has reduced his risk. As one court aptly noted: "This form of contract partially hedge[s] the lawyer against the downside risk of a low damage award". McKinnon v. City of Berwyn, 750 F.2d at 1393. An upward adjustment for risk would simply be providing the attorney with more (unnecessary) insurance. Id.

Furthermore, the market based hourly rates used to calculate the lodestar figure reflect some risk of nonpayment:

> All lawsuits have a risk of nonpayment attached to them. . . every attorney faces a risk of not getting paid for some of the work expended on behalf of a client, because, for a variety of reasons, not all hours worked are billed and recouped by an attorney. The hourly rates which attorneys charge reflect the fact that a certain number

> of hours rendered will not generate any legal fees. . . Thus, an enhancement of the lodestar figure for the risk of nonpayment is not proper if the risk of nonpayment in the particular case is the same as it is in the average case in the relevant market.

Murray v. Weinberger, 741 F.2d at 1431.[32/]

Accordingly, an upward adjustment based on the contingent nature of

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32/ See also City of Riverside v. Rivera, 54 U.S. L.W. 3143, 3144 (In Chambers Opinion of Rehnquist, J.) (September 10, 1985), cert. granted, 54 U.S. L.W. 3263 (October 22, 1985) ("In this sense, nearly all fees are to a certain extent 'contingent', because the time billed for a lawsuit must bear a reasonable relationship not only to the difficulty of the issues involved but to the amount to be gained or lost by the client in the event of success or failure."); National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1328 ("no premium for risk should be awarded where the hourly rate used in calculating the lodestar already contains an allowance for the possibility that the suit would not succeed and no fee would be obtained.").

success is not permissible since it would constitute "double counting" and result in a "windfall" to the attorney.

III. NON-PROFIT LEGAL SERVICES ORGANIZATIONS WHICH DO NOT BILL CLIENTS INCUR NO CONTINGENCY OR RISK AND, THEREFORE, ARE NOT ENTITLED TO AN UPWARD ADJUSTMENT ON THAT BASIS.

Even if the contingent nature of success in the case and the resulting risk of nonpayment is a permissible factor in determining a "reasonable" attorney's fee, and an upward adjustment in the lodestar on that basis does not constitute "double counting", the contingency factor is not a permissible consideration where plaintiffs, as in the present case, are represented by a nonprofit public interest law firm which

does not bill its clients.[33/]

The amici States recognize the Court's view expressed in Blum, supra, 104 S. Ct. at 1550 n. 18, that "in the rare case in which an upward adjustment to the presumptively reasonable fee of rate times hours is appropriate, we draw no distinction between profit and non-profit law offices." However, Blum addressed upward adjustments based on quality of representation and results obtained, factors which, as a practical matter, apply equally to legal services attorneys and private attorneys. In the present case, the amici States contend that, as a practical matter, the factor of contingency does not apply equally

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33/ Since market based hourly rates are used for legal services organizations as well as for private attorneys, Blum, 104 S. Ct. at 1547, legal services attorneys are already being compensated for some risk. See discussion supra at 51-52.

and, therefore, non-profit legal services organizations and for profit private firms should be treated differently in this one instance.

Legal services attorneys "cannot truly be said to have undertaken a risk of no remuneration." Vecchione v. Wohlgemuth, 481 F. Supp. 776, 795 (E.D. Pa. 1979). As aptly stated by one commentator:

> If an organization is not permitted to charge its clients for its services . . . what does that organization risk in undertaking representation in one of the few types of cases which permit recovery of a fee? . . . [L]itigation which permits the collection of a fee by a federally funded legal services organization is actually the most lucrative type of litigation available to such organizations.[34/]

34/ Comment, Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976, 13 J. Mar. L. Rev. 331, 369-70 and n. 189 (1980).

For this reason, a number of courts have refused to award contingency adjustments to legal services attorneys. See, e.g., New York Association for Retarded Children v. Carey, 711 F.2d at 1154; Cole v. Tuttle, 462 F. Supp. 1016, 1019 (N.D. Miss. 1978).

Nor can contingency adjustments in the case of legal services organizations be justified on other grounds. Such adjustments cannot operate as an incentive for such organizations to take more of a certain type of case, cf. Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978), since an Internal Revenue Service ruling prohibits a public interest law firm seeking tax-exempt status from "us[ing] the likelihood or probability of a fee award as a consideration in its selec-

tion of cases." Rev. Proc. 75-13, § 3, 1975-1 Cum. Bull. 662.[35/] Furthermore, no additional incentive is needed to induce such organizations to take on such cases, since "[t]hese organizations exist to represent groups like the [plaintiff] class, with constitutional claims at the cutting edge of the law." New York Association for Retarded Children v. Carey, 711 F.2d at 1154. Nor should contingency adjustments be used as an indirect means of funding legal services organizations. Compare Copeland III,

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35/ Under 42 U.S.C. § 2996f(b)(1), funds made available by Legal Services Corporation (either by contract or by grant) ordinarily may not be used to provide legal assistance in fee-generating cases unless the client seeks statutory benefits only and appropriate private representation is not available.

641 F.2d at 899 with id. at 920 n. 32 (dissent). The Clean Air Act was not intended for that general purpose. Rather, as discussed above, it was intended to finance successful cases only. There is no guarantee that upward adjustments received by legal services organizations will be used for that limited purpose.

For all of these reasons, upward adjustments based on contingency or risk of nonpayment can only be characterized as impermissible windfalls to non-profit public interest law firms and legal services organizations. Therefore, such adjustments are not warranted.

CONCLUSION

For all of the reasons discussed above, the Court should vacate the decision of the United States Court of Appeals for the Third Circuit and remand the case to that court for recomputation of a reasonable attorney's fee.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

SUZANNE E. DURRELL
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-1007
Counsel of Record

ROBERT K. CORBIN, Attorney General
State of Arizona

JOSEPH I. LIEBERMAN, Attorney General
State of Connecticut

MICHAEL J. BOWERS, Attorney General
State of Georgia

RICHARD G. OPPER, Attorney General
Territory of Guam

CORINNE K.A. WATANABE, Attorney General
State of Hawaii

JIM JONES, Attorney General
State of Idaho

NEIL F. HARTIGAN, Attorney General
State of Illinois

LINLEY E. PEARSON, Attorney General
State of Indiana

DAVID L. ARMSTRONG, Attorney General
State of Kentucky

WILLIAM J. GUSTE, JR., Attorney General
State of Louisiana

JAMES E. TIERNEY, Attorney General
State of Maine

STEPHEN H. SACHS, Attorney General
State of Maryland

FRANK J. KELLEY, Attorney General
LOUIS J. CARUSO, Solicitor General
State of Michigan

EDWIN LLOYD PITTMAN, Attorney General
State of Mississippi

WILLIAM L. WEBSTER, Attorney General
State of Missouri

STEPHEN E. MERRILL, Attorney General
State of New Hampshire

LACY H. THORNBURG, Attorney General
State of North Carolina

NICHOLAS J. SPAETH, Attorney General
State of North Dakota

ANTHONY J. CELEBREZZE, JR., Attorney General
State of Ohio

MICHAEL C. TURPEN, Attorney General
State of Oklahoma

T. TRAVIS MEDLOCK, Attorney General
State of South Carolina

JEFFREY L. AMESTOY, Attorney General
State of Vermont

WILLIAM BROADDUS, Attorney General
Commonwealth of Virginia

KENNETH O. EIKENBERRY, Attorney General
State of Washington

CHARLES G. BROWN, Attorney General
State of West Virginia

A.G. McCLINTOCK, Attorney General
State of Wyoming

FRANK J. KELLEY, Attorney General
LOUIS J. CARUSO, Solicitor General
State of Michigan

EDWIN LLOYD PITTMAN, Attorney General
State of Mississippi

WILLIAM L. WEBSTER, Attorney General
State of Missouri

STEPHEN E. MERRILL, Attorney General
State of New Hampshire

LACY H. THORNBURG, Attorney General
State of North Carolina

NICHOLAS J. SPAETH, Attorney General
State of North Dakota

ANTHONY J. CELEBREZZE, JR., Attorney General
State of Ohio

MICHAEL C. TURPEN, Attorney General
State of Oklahoma

T. TRAVIS MEDLOCK, Attorney General
State of South Carolina

JEFFREY L. AMESTOY, Attorney General
State of Vermont

WILLIAM BROADDUS, Attorney General
Commonwealth of Virginia

KENNETH O. EIKENBERRY, Attorney General
State of Washington

CHARLES G. BROWN, Attorney General
State of West Virginia

A.G. McCLINTOCK, Attorney General
State of Wyoming

SUPPLEMENTAL

BRIEF

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No. 85-5

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR et al.,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF PETITIONER COMMONWEALTH OF PENNSYLVANIA

JAY C. WALDMAN
Special Counsel

HENRY G. BARR
General Counsel

JOHN P. KRILL*
Executive Deputy
General Counsel

JOHN M. HRUBOVCAK
Assistant Counsel

Attorneys for
Petitioners

Office of General Counsel
Commonwealth of Pennsylvania
P. O. Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

*Counsel of Record

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SUMMARY OF ARGUMENT

In its Order of July 7, 1986, in this case, this Court scheduled reargument on whether likelihood of success (or risk of loss) may be used to justify a multiplier of a presumptively reasonable attorneys' fee award under the Clean Air Act. Likelihood of success should not be used to justify an increase of the basic fee award, and to do so is irrational, invites lawyers to flood the courts with marginal litigation and is inconsistent with this Court's holdings in Hensley v. Eckerhart, 461 U.S. 424 (1983) and Blum v. Stenson, 465 U.S. 886 (1984). Further, if such a multiplier is ever appropriate, it should not have been used in this case where the losing party bore the burden of proof and persuasion, and where the lower court failed to make the kind of detailed findings required by this Court's holdings to justify any fee enhancement.

ARGUMENT

I. LIKELIHOOD OF SUCCESS SHOULD NOT BE A FACTOR USED TO JUSTIFY MULTIPLYING OR ENHANCING A BASIC FEE AWARD.

The enhancement of fee awards based on likelihood of success (or risk of loss) by use of so-called contingency multipliers is illogical and unfair. The practice requires a court to estimate at the conclusion of a case how likely it may have been at the outset to rule against the party that has, in fact, prevailed. To say the least, this is a highly subjective exercise and one that is not susceptible to meaningful review.

The result can be the imposition of an enormous additional fee burden on a non-prevailing defendant that bears no relationship to the work actually per-

formed by the plaintiff's attorney. Conversely, the practice results in windfall payments to attorneys for work they never performed. The unfortunate effects of this practice are to penalize most heavily those defendants with the strongest defenses, and to invite attorneys to pursue marginal cases in quest of prodigious fees in what begins to resemble a judicial "crapshoot." See McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1985).

The very notion of a contingency multiplier is fundamentally at odds with the concept of a presumptively reasonable lodestar fee established by this Court. In virtually every case, there is some risk that a plaintiff may not prevail. Accordingly, allowing the use of a contingency multiplier invites the

district courts in virtually every case to enhance the basic fee award by some subjectively derived percentage.

Upon close examination, the factor of likelihood of success appears as merely a blurred collection of other factors which this Court has rejected as a basis for enhancing the lodestar fee in Blum v. Stenson, 465 U.S. 886 (1984). In its prior opinion in this case, as well, this Court stated:

> A strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly

> the fee an attorney could earn through a private fee arrangement with his client.

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S. Ct. 3088, 3098 (1986).

The Court further stated that:

> [T]he "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.

Id.

The so-called "likelihood of success" factor should be treated no differently. It is a factor which is inherently included in a basic fee award.

The fundamental components of the likelihood of success in a suit are the quality of counsel and the merits of the case. The quality of plaintiff's counsel has been already rejected as an independent basis for a multiplier, whether styled as "the special skill and experience of counsel" or the "quality of representation", because it is included in the lodestar. Likewise, the difficulty in overcoming unfavorable facts or precedent in a case is subsumed in the "novelty and complexity of the issues" factor, which has also been rejected as a basis for a multiplier, and in the hours of work required of counsel, which are already reflected in the lodestar. Delaware Valley cited the tenacious defense of the Commonwealth as a factor that increased its risk of loss, but this is also obviously incorporated in the hours spent by

Delaware Valley's counsel and is reflected in the lodestar. Using a vigorous defense to justify a fee increase would therefore be double-counting of attorney's hours. Such double-counting was expressly disapproved in Blum. 465 U.S. at 899.

Since the initial argument in this case, two of the Circuits which have permitted contingency multipliers appear to be re-evaluating their positions. In Ridenour v. Montgomery Ward & Co., 786 F.2d 867 (8th Cir. 1986), the Eighth Circuit refused to allow fee enhancement for contingency-based factors, noting that these were reflected in the basic fees. See also Planned Parenthood v. State of Arizona, 789 F.2d 1348 (9th Cir. 1986).

Also, the enhancement of the lodestar for the risk of losing and obtaining no fee in effect compensates attorneys for unsuccessful claims in unrelated cases. This is clearly inconsistent with the scheme adopted by Congress in the fee-shifting statutes. Murray v. Weinberger, 741 F.2d 1423, 1431 (D.C. Cir. 1984); Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 27 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 3488 (1985). Most importantly, it is inconsistent with this Court's holdings in Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) and Hensley v. Eckerhart, 461 U.S. 424 (1983). In Ruckelshaus, this Court held that Congress intended that fees in Clean Air Act cases be awarded only to prevailing parties. In Hensley, this Court held that plaintiffs' counsel could not be compensated even for

distinct claims on which they failed to prevail in the same case in which they prevailed on other claims.

Finally, there is no evidence that a contingency multiplier is needed to achieve the congressional purpose of encouraging competent attorneys to provide representation in meritorious cases involving federal statutory and constitutional claims. Advocates of a fee multiplier based on likelihood of success argue that, without it, clients will have difficulty finding competent counsel to take these cases. There is simply no empirical evidence to support this claim. There is certainly no evidence in the record of this case to show that any lawyer ever had any reservations about representing Delaware Valley.

In fact, the common experience of the bench and bar supports the opposite conclusion: the public has no difficulty finding counsel to bring dubious lawsuits, while counsel are even more eager to handle the meritorious ones. Justice Powell observed, in a footnote to his concurring opinion in City of Riverside v. Rivera, 106 S. Ct. 2686 (1986), that civil rights filings in the federal courts continue to increase as does the supply of lawyers; there is no empirical study supporting the view that aggrieved persons now have difficulty in obtaining counsel in civil rights cases. Id. at 2701 n.4 (Powell, J., concurring).

On the contrary, the only data available seem to support the opposite conclusion. In 1985, 7.14% or 19,553 cases of the civil cases filed in the

United States District Courts were civil rights cases. Annual Report of the Director of the Administrative Office of the United States Courts 151 (1985). Civil rights petitions filed by state and federal prisoners amounted to an additional 19,448 civil rights cases, Annual Report 149, for a combined total of 14.3% of the 1985 civil case filings.

The filing of civil rights cases does not seem to have been discouraged in any way in the two Circuits (the Seventh and District of Columbia) that have expressly disapproved of contingency multipliers. In 1985 in the district courts of the Seventh Circuit, private civil rights filings were a higher percentage of total private civil cases filed than in any other circuit. In 1985, total non-prisoner civil rights filings in the

District of Columbia and Seventh Circuits were a higher percentage of total civil cases than in any other circuit. Annual Report 284-91, Table C3.

In comparing the number of employment civil rights cases, Annual Report 152-53, to the number of civil cases filed in each district court by Circuit in 1985, Annual Report 132-33, the Seventh and the District of Columbia Circuits have among the highest ratios (3.54% and 4.52% respectively), while the Third Circuit, which has allowed that multiplier, has a ratio of only 2.65%. Further, the petitions for attorney fees under the Equal Access to Justice Act, which sets a reasonable hourly rate of $75 per hour, have increased 89.9% from 1984 to 1985. Annual Report 97. Although not dispositive, these data indicate that there is no need

to use a fee multiplier based on likelihood of success to secure counsel for meritorious litigation.

The policy argument for a contingency multiplier assumes that all competent lawyers are currently billing all their available time at or above the prevailing market rates and must have an incentive to shift their efforts into civil rights, environmental law and other fields where federal statutes are involved. This assumption is unrealistic, given the supply of lawyers (an estimated 675,000 in 1985, City of Riverside v. Rivera, 106 S. Ct. at 2701 n.4 (Powell, J., concurring)). Many good lawyers have time to occupy in a meritorious cause, even though the recovery of their fees is uncertain, since a venture producing some chance of a fee is better than none at all. Since many

lawyers even take cases at below the prevailing hourly rate, there is reason to believe that the "market rate" that is a guaranteed part of a lodestar fee is itself a very sufficient incentive to attract lawyers to meritorious cases. Without even considering the availability of publicly-funded legal services and the bar's tradition of pro bono public legal work, there are good grounds to believe congressional policy is well-served without a contingency multiplier for fees. There is no basis for a contrary belief.

II. THE USE OF A CONTINGENCY MULTIPLIER IN THIS CASE WAS PARTICULARLY IMPROPER AND ERRONEOUS.

If a contingency multiplier is ever appropriate, its use surely must be circumscribed by the same stringent standards this Court set forth in Blum for use of a so-called "quality multiplier." Blum prohibits the use of such multipliers except in a "rare" case where the fee applicant offers "specific evidence" and the lower court makes "detailed findings" to demonstrate that the representation provided is not adequately reflected in the hourly rates charged.

In this case, the district court increased fees by up to 200% for relatively inexperienced attorneys already receiving what the court itself

characterized as a "high hourly rate" (Pet. App. 25a). This resulted in the equivalent of hourly rates of up to $400 or compensation for 1700 hours of legal work never performed.

The district court's explanation consisted of three conclusory paragraphs in a forty-five page opinion (Pet. App. 39a-40a). The court did not make any detailed findings to support its use of a contingency multiplier or its conclusion that Delaware Valley had a low likelihood of success in the three phases of this litigation where contingency multipliers were applied. Moreover, this conclusion is flatly contradicted by the fact that the state officials bore a heavy burden of proof and persuasion in each of these phases. See Petitioner's Brief at 15-17.

In reversing the upward adjustment for quality in its prior opinion in this case, this Court found that the lower court did not make the kind of detailed findings required to justify why the lodestar amount was unreasonable and why the quality of representation was not reflected in the basic fee award. Similarly, the award of an upward adjustment for likelihood of success in this case lacked any detailed findings as to why the lodestar amount was unreasonable and lacked any detailed findings as to why there should be any increase for likelihood of success. It should likewise be reversed.

CONCLUSION

For the foregoing reasons, and for those set forth in Petitioner's Brief at 10-17 and the Brief for the United States at 15-37, Petitioner respectfully requests that this Court reverse the judgment of the court of appeals. Petitioner further requests this Court to rule that likelihood of success cannot be used as a factor in increasing the basic fee award.

Respectfully submitted,

JAY C. WALDMAN
Special Counsel

HENRY G. BARR
General Counsel

JOAN M. HRUBOVCAK
Assistant Counsel

JOHN P. KRILL
Executive Deputy
General Counsel
(Counsel of Record)

Attorneys for Petitioner

Office of General Counsel
Commonwealth of Pennsylvania
P. O. Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

SUPPLEMENTAL

BRIEF

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No. 85-5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS ON REARGUMENT

James D. Crawford*
Joyce S. Meyers
William J. Maffucci
Attorneys for Respondents.

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103
215-751-2162
Of Counsel.

*Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

May not the attorneys' fees chargeable to a losing defendant under the Clean Air Act and comparable statutes be enhanced based on the risk of loss?

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SUMMARY OF ARGUMENT

Federal decisions over the past six months lend further support to the arguments DVCCCA presented in its original brief. Since *Blum v. Stenson*, 465 U.S. 668 (1984), was decided, twelve of the thirteen federal courts of appeals have reaffirmed the use of "contingency" or "risk" multipliers and enhancements. Contingency adjustments are permitted in the one remaining circuit as well, based on pre-*Blum* precedents.

The reformulated arguments and "empirical" evidence offered in the Commonwealth's supplemental brief provide no additional ground for either prohibiting contingency multipliers *per se* or disapproving their application by the district court in this case. The use of contingency multipliers is not inconsistent with *Blum* because *Blum* specifically declined to address them and because the logic for restricting the use of other multipliers simply does not apply to them.

Judge Bechtle's informed decision to double his lodestar calculation for three of nine phases of the litigation in order to reflect the risk of non-payment overcome by DVCCCA's attorneys was well within his discretion. Retroactively disturbing fee decisions which do not clearly abuse that discretion can only jeopardize the ability of district judges to serve Congress's goal of attracting competent counsel to represent citizens as private attorneys general enforcing important federal legislation.

ARGUMENT

I. FEDERAL CASES DECIDED SINCE THIS CASE WAS ARGUED HAVE CONTINUED TO APPROVE THE USE OF CONTINGENCY MULTIPLIERS.

In its original brief, DVCCCA documented the consensus of federal courts of appeals that the use of contingency multipliers was contemplated by Congress and

plays an essential role in assuring effective private enforcement of important federal legislation. DVCCCA pointed out that every court of appeals had approved their use and that at least nine of these courts had reaffirmed their support during the two-year period following *Blum v. Stenson*, 465 U.S. 886 (1984).[1] Brief of Respondent at 18-22. Further research reveals an appellate decision from yet another circuit, decided before the original oral argument in this case, which expressly approved a contingency adjustment. *Kelley v. Metropolitan County Board of Education*, 773 F.2d 677, 686 (6th Cir. 1985) (en banc).

Since the argument in this case on March 3, 1986, many courts of appeals have had another opportunity to address the use of contingency multipliers. While a few of these decisions reflect the natural apprehension judges have felt using *any* multiplier during the pendency of this case, no court has retracted its position that contingency multipliers must be applied when warranted by the facts of the case.[2] Moreover, during this

1. The Commonwealth's repeated contention that contingency multipliers have been declared impermissible *per se* in the D.C. Circuit and Seventh Circuit is, simply, incorrect. *See Murray v. Weinberger*, 741 F.2d 1423, 1431 (D.C. 1984) (listing prerequisites for upward contingency adjustment); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 661 (7th Cir. 1985) (explaining that "we do not mean to imply that a multiplier for the contingent nature of success is inappropriate when lawyers bear the risk of non-payment and the delay in payment").

2. Decisions which approve the use of contingency multipliers include: *Lewis v. Coughlin*, No. 85-2195, slip op. (2d Cir. Sept. 10, 1986) (LEXIS, Genfed library, Courts file); *Durrett v. Cohen*, 790 F.2d 360, 362, 363-64 & n.3 (3d Cir. 1986); *Nisby v. Commissioner's Court*, No. 85-2134, slip op. (5th Cir. Aug. 22, 1986); *Kirchoff v. Flynn*, 786 F.2d 320, 323-28 & n.5 (7th Cir. 1986); *Chalmers v. City of Los Angeles*, No. 82-6112, slip op. (9th Cir. Aug. 15, 1986) (LEXIS, Genfed library, Courts file); *Planned Parenthood v. Arizona*, 789 F.2d 1348, 1353 (9th Cir. 1986); *Lattimore v. Oman Construction Co.*, No. 85-7790, slip op. (11th Cir. Aug. 4, 1986) (LEXIS, Genfed library, Courts file). Decisions

time the courts of appeals for the Second Circuit and the Fifth Circuit have handed down their first post-*Blum* opinions affirmatively endorsing the use of contingency adjustments. *Lewis v. Coughlin*, No. 85-2195, slip op. (2d Cir. Sept. 10, 1986) (LEXIS, Genfed library, Courts file); *Nisby v. Commissioner's Court*, No. 85-2134, slip op. (5th Cir. Aug. 22, 1986) (LEXIS, Genfed library, Courts file). To date, therefore, twelve federal courts of appeals have addressed the use of contingency multipliers after *Blum* and every one has reaffirmed its support for them in appropriate cases.

II. PETITIONER'S REFORMULATED ARGUMENTS AND NEW "EMPIRICAL" EVIDENCE PROVIDE NO ADDITIONAL GROUND FOR EITHER PROHIBITING CONTINGENCY MULTIPLIERS *PER SE* OR FOR DISAPPROVING THE MANNER IN WHICH THEY WERE APPLIED BY THE DISTRICT COURT HERE.

A. The Use of Contingency Multipliers Is Not Inconsistent with This Court's Decision in *Blum v. Stenson*.

In its supplemental brief, the Commonwealth reformulates two arguments suggesting that the fee calculation of the district court below violated the requirements of *Blum:* that the application of a contingency multiplier constituted "double counting" and that the court did not document adequately how this was a "rare" case calling for the application of a contingency multiplier. The first argument evinces once again the Com-

which disapprove particular usages of contingency multipliers under facts of case but which leave intact court's policy of permitting such multipliers when warranted by facts of the case include: *Hart v. Bourque*, No. 1629, slip op. (1st Cir. Aug. 12, 1986) (LEXIS, Genfed library, Courts file); *Almond v. Boyles*, 792 F.2d 451, 456, 457 & n. (4th Cir. June 6, 1986); *Ridenour v. Montgomery Ward*, 786 F.2d 867, 869 (8th Cir. Mar. 21, 1986).

monwealth's refusal to acknowledge the nature of the "risk of failure" overcome by DVCCCA's attorneys. The latter charge rests upon a misreading of *Blum* and is, in any event, abundantly contradicted by the facts of the case.

Blum, as the Commonwealth notes, cautioned against "double counting" — *i.e.*, compensating through the use of multipliers for factors which already are reflected in the lodestar calculation. *See* 465 U.S. at 898-99 ("novelty and complexity of issues" should be reflected in the number of hours used to compute lodestar and therefore should not serve as basis for multiplier); *id.* at 899 ("quality of representation" generally is reflected in reasonable hourly rates but may, in "rare" or "exceptional" cases, justify upward adjustment); *id.* at 900 ("results obtained" generally are subsumed under other factors and thus should not justify upward adjustment unless evidence shows that such an adjustment is warranted by facts). The Court, however, specifically declined to limit in the same way the use of contingency multipliers. *Id.* at 901 n.17. This is both logical and fair because contingency is not reflected in hours expended and usually — as here — is not reflected in hourly rates.

The Commonwealth nevertheless argues that contingency multipliers constitute "merely a blurred collection" of the factors which *Blum* identified as conducive to double counting. Supplemental Brief of Petitioner at 4. "The fundamental components of the likelihood of success," the Commonwealth proclaims, "are the quality of counsel and the merits of the case." But, as the history of this case demonstrates, the risk of non-payment inherent in statutory-fee work derives from myriad factors, many of which are entirely unrelated to either the quality of counsel or the merits of the case.[3]

3. One such factor is illustrated by another recent case involving private efforts to enforce provisions of the Clean Air Act. In *Concerned Citizens of Bridesburg v. City of Philadelphia*, No. 85-14, slip op. (E.D. Pa. July 28, 1986), residents living in the vicinity of the Northeast Philadelphia water-pollution control plant sought to restrain the emission therefrom of noxious fumes. Three days before trial, the EPA amended its regulations to omit the odor-pollution provisions which had provided the plaintiffs with a federal cause of action. Judge VanArtsdalen nevertheless granted equitable relief on the pendent state common-law nuisance claim. *Id.* at 37, 42. But since the EPA's amendment deprived the plaintiffs of a cause of action under the Clean Air Act, Judge VanArtsdalen was compelled to deny their request for attorneys' fees. *Id.* at 44.

Indeed, those two factors played little or no role in making DVCCCA's victory uncertain.

In justifying the use of multipliers here, both the district court and the court of appeals pointed directly to the real reasons DVCCCA's success was entirely uncertain. DVCCCA, Judge Bechtle explained, "battled a state governmental system that sought to defy a lawful order of this court system by resorting to discredited concepts of nullification, first by its legislature and next by its supreme court." Pet. App. at 66a-67a. For nine years, the appellate court wrote, "every branch of the government of the Commonwealth of Pennsylvania — the executive, legislative, and judicial — ha[d] fought tooth and nail every effort of plaintiff to make Pennsylvania respect the provisions of a federal statute." *Id.* at 65a.

Nowhere in the opinions of the courts below is there any suggestion that the risk of failure and non-payment faced by DVCCCA's attorneys during the three phases for which they earned contingency enhancements derived even in part from the quality of representation or the merits of DVCCCA's legal theories. To the contrary, the courts recognized that this risk of failure arose *despite* the fact that the legal representation was "superior" and that the Commonwealth's legal arguments were "discredited." *See, e.g., id.* at 66a-67a. That the Commonwealth effectively conceded the merits of DVCCCA's case by entering the consent decree certainly did not obviate the need for the DVCCCA to combat for seven additional years the Commonwealth's dilatory and evasive

efforts to nullify this "success." The contingency arose, pure and simple, from the superior resources of the Commonwealth, the respect which must be given the states under the doctrine of federalism, and the willingness of the Commonwealth to take unfair advantage of those facts.

The Commonwealth also asserts that Judge Bechtle did not specify in sufficient detail how this was one of the "rare" cases justifying the use of a contingency multiplier and that therefore his methodology was not as rigorous as that prescribed in *Blum*. This conclusion is both incorrect and irrelevant. Despite the Commonwealth's insistence that the use of contingency multipliers "surely must be circumscribed by the same stringent standards this court set forth in *Blum* for use of a . . . quality multiplier," Supplemental Brief of Petitioner at 15, *Blum* does *not* condition the use of contingency multipliers upon a showing that the case was "rare" or "exceptional" or upon explicit findings of fact. Again, *Blum* specifically declined to address whether the use of contingency multipliers should (like the use of "quality" or "results obtained" multipliers) be restricted in this manner. 465 U.S. at 901 n.17.

In fairness to the Commonwealth, DVCCCA acknowledges that several federal courts of appeals have misinterpreted *Blum* in the way the Commonwealth proposes. *See* Note, *Attorney Fees and the Contingency Factor Under 42 U.S.C. § 1988: Blum v. Stenson, 465 U.S. 886 (1984)*, 64 Or. L. Rev. 571, 581 n.62 (1986) (collecting cases). The reason is difficult to fathom, given this Court's clear language in *Blum*. Nowhere in the oft-cited passages of that opinion is there any indication that the guidelines set forth as to the use of multipliers based on quality and the results obtained — factors which often are reflected in the lodestar figures — should extend to contingency multipliers. Manifestly, therefore, the decisions which have restricted the use of contingency multipliers to "rare" and "exceptional" cases overread *Blum*.

Cf. Lewis v. Coughlin, No. 85-2195, slip op. (2d Cir. Sept. 10, 1986) (LEXIS, Genfed library, Courts file) (specifically rejecting interpretation of *Blum* which would limit contingency multipliers to exceptional cases); *Laffey v. Northwest Airlines*, 746 F.2d 4, 34-39 & n.15 (D.C. Cir. 1984) (Wright, J.) (dissenting from such a misinterpretation of *Blum*), *cert. denied*, _____ U.S. _____, 105 S. Ct. 3488 (1985). *See also* Note, *supra*, 64 Or. L. Rev. at 583 & n.71 (explaining how apparently inadvertent misquotation of *Blum* led Sixth Circuit in *Davis v. Combustion Engineering*, 742 F.2d 912, 923 (6th Cir. 1984), to disapprove contingency enhancement on ground that case was not exceptional).

Logic, too, compels the conclusion that *Blum* did not preclude or restrict the use of contingency multipliers. Rewarding attorneys who prevail despite the risk of nonpayment simply does not give rise to the concern this Court expressed in *Blum* regarding multipliers based on quality or on the results obtained. Though those multipliers tend to reward attorneys for factors subsumed in the basic lodestar calculation, risk multipliers reward attorneys for factors which are, in most cases, *systematically excluded* from the lodestar calculation. The fact that a fee will only be paid to a prevailing party does not mean that counsel in such cases will spend more hours than counsel in non-contingent cases. Rather, counsel are likely to be extremely careful of the hours they spend, since they cannot be sure that their work will be compensated at all. Moreover, the hours spent by counsel in successful statutory-fee cases are regularly subjected to scrutiny by the court and to challenge by opposing counsel. Similarly, although the lodestar hourly rate could be increased to reflect contingency, this is rarely, if ever, done. Rather, the hourly rates are determined by reference to the rates prevailing in the private, non-contingent market because those are the only rates readily discoverable. Moreover, courts typically can not, in arriving at lodestar figures, compensate attorneys for

one major aspect of the risk of non-payment: the economic loss caused by the delay in payment. Even if a court were to compensate attorneys at current rates for work performed in earlier years — something Judge Bechtle did *not* do — the attorneys would not thereby be compensated fully for the time value of the money. *See* Affidavit of Frank H. Easterbrook and Robert A. Sherwin at 7-8 & n.5, *In re Burlington Northern Employment Practices Litigation*, No. 78 C 269, Master File No. MDL 374 (N.D. Ill. 1984) (pointing out that since 1976 the average rate of return on capital has been about 15% annually, a rate which has outpaced both the general inflation rate and the typical rise in hourly rates charged by attorneys).

Moreover, even though *Blum* neither literally nor logically limits the use of risk multipliers to exceptional cases, this case would readily fulfill any such requirement. This, truly, was a case in which the risk of non-payment was "exceptional" — a risk which Judge Bechtle portrayed not only in the three paragraphs in which he summarized it, but also in the lengthy passages in which he chronicled the Commonwealth's exhaustive efforts to shirk its responsibilities under the Clean Air Act. *See* Pet. App. at 2a-6a (581 F. Supp. at 1416-18).[4]

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4. The Commonwealth also asserts that the DVCCCA'S attorneys were "relatively inexperienced" and intimates that this status would undermine Judge Bechtle's specific findings for rewarding a contingency multiplier. Supplemental Brief of Petitioner at 15-16. This *ad hominem* analysis, too, is both irrelevant and incorrect. During the three phases of the litigation for which DVCCCA earned contingency multipliers, only one attorney was compensated at a rate reflecting significant experience as an attorney; the others were compensated at "associate" rates. The attorney compensated at $100/hour performed work during these phases which, in Judge Bechtle's words, was "typical of work performed by lead counsel in any complex litigation." Pet. App. at 25a (581 F. Supp. at 1427). By the time he performed this work, he had been a practicing lawyer for at least four years, performing public service which would earn him professional acclaim. *See, e.g.*, Goldsborough, *Working For the People: A Profile of Jerry Balter*, The Shingle (Phila. Bar Ass'n Quarterly Magazine), Summer 1986, at 32. Before becoming an attorney, he spent 29 years as an engineer working in fields directly related to his work for DVCCCA.

Even if the one DVCCCA attorney compensated at $100/hour were not so experienced and highly acclaimed, both the rate Judge Bechtle selected and the "effective" rate resulting from Judge Bechtle's multiplier would be appropriate. " '[I]f a young attorney demonstrates the skill and ability, he should not be penalized for only recently being admitted to the bar.' " *City of Riverside v. Rivera*, _____ U.S. _____, 106 S. Ct. 2686, 2692 (June 27, 1986).

B. The Use of Contingency Multipliers Will Not Promote Frivolous Litigation or Produce "Windfalls" for Attorneys.

The Commonwealth asserts once more that the use of contingency multipliers promotes frivolous litigation and produces "windfalls" for prevailing attorneys. *See* Supplemental Brief of Petitioner at 3. Seizing upon concerns expressed in *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1985), and *Laffey v. Northwest Airlines*, 745 F.2d 4, 27-28 (D.C. Cir. 1984), *cert. denied*, _____ U.S. _____, 105 S. Ct. 3488 (1985), the Commonwealth portrays its gruesome vision of federal courts multiplying lodestar fee calculations by, say, fifty to reward attorneys whose prospects for success at the outset were only two percent. Accordingly, the Commonwealth argues, contingency multipliers "penalize most heavily those defendants with the strongest defenses, and . . . invite attorneys to pursue marginal cases in quest of prodigious fees . . . ." Supplemental Brief of Petitioner at 3.

In fact, however, no court has ever awarded a multiplier anywhere near as large as that envisioned by the Commonwealth. A moment's reflection suggests at least four reasons why such multipliers will never be used and why frivolous litigation will not be promoted through the use of the multipliers courts do allow. First, attorney fees

are awarded only to *prevailing* parties; their victories provide proof that their actions were not frivolous. Second, the sanctions which may be imposed under newly amended Federal Rule of Civil Procedure 11 provide a palpable *disincentive* to frivolous claims. Third, judges assessing retroactively the merits of a victorious statutory-fee case are unlikely to conclude that the prospects for success at the outset were minuscule; instead, the natural conclusion is that the attorneys had undertaken and prosecuted the litigation with a reasonable expectation of success. Fourth, and perhaps most important, the absence of any precedent for multipliers as large as those envisioned by the Commonwealth, coupled with the abundance of authority for multipliers no larger than those applied in this case, is certain as a practical matter to give pause to any judge contemplating an unprecedented or unreasonably generous multiplier and to any attorney contemplating whether to undertake a "marginal" statutory-fee matter.

The Commonwealth contends, finally, that contingency multipliers indirectly compensate attorneys for "losing" cases and that they therefore violate Congressional intent. But contingency multipliers are awarded to reflect the risks prevailing attorneys overcame in *particular* litigation resulting from the uncertainty of, and the delay in, payment. Their true economic effect is to serve, not violate, Congressional intent by assuring that the market for statutory-fee work does not diverge so radically from the private, hourly-fee market that competent attorneys would never find it economically feasible to accept statutory-fee work. This hardly constitutes "compensation" for unsuccessful claims.

C. The Statistics Offered by the Commonwealth Are Entirely Inappropriate and Misleading.

The Commonwealth attempts to disprove the need for contingency multipliers by offering statistics comparing the number of civil-rights filings in the Third Circuit with those in the two circuits in which the Commonwealth believes contingency multipliers have been forbidden. Supplemental Brief of Petitioner at 10-13. The very premise of this empirical presentation, however, is objectively incorrect. There is no conflict among the circuits as to the permissibility *per se* of contingency multipliers. *See supra* note 1 and accompanying text.

Even if contingency multipliers had been disapproved in certain circuits, a mere comparison of the number of civil-rights cases filed in those circuits with the number filed elsewhere would, for several reasons, shed no light on whether contingency multipliers attract competent counsel to statutory-fee work. Such statistics would reveal neither the percentage of cases filed by counsel rather than *pro se* nor the percentage of cases brought by attorneys that were taken solely or even partly on a contingent-fee basis. Even if these facts were known, they would not reveal the particular role contingency multipliers played in attracting counsel because myriad other factors (such as the idiosyncrasies of the judges or differences in local procedure) may contribute to the number of filings.

Not surprisingly, no such relevant statistics are available. But that absence of empirical evidence hardly provides this Court with any basis for abruptly ruling that Congress did not authorize, and every federal court of appeals was wrong in endorsing, the use of contingency enhancements.

III. JUDGE BECHTLE'S INFORMED DECISION TO DOUBLE HIS LODESTAR CALCULATION FOR THREE OF NINE PHASES OF THE LITIGATION IN ORDER TO REFLECT THE RISK OF NON-PAYMENT OVERCOME BY DVCCCA'S ATTORNEYS WAS WELL WITHIN HIS DISCRETION.

Congress entrusted to federal trial judges considerable discretion to determine reasonably compensatory statutory fees. Critical to this determination is an acknowledgment of the attorneys' service not merely to their individual clients but to the general public in vindicating federal policies of paramount importance. *See City of Riverside v. Rivera*, _____ U.S. _____, 106 S. Ct. 2686, 2695 (1986). Likewise, trial judges must award fees sufficient to attract competent counsel to future statutory-fee work. *See Blum*, 465 U.S. at 886 (citing S. Rep. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913). The process of determining a "reasonably compensatory fee," thus, involves not merely a mechanical calculation of the number of hours worked times the appropriate hourly rate but, just as importantly, a decision by the trial judge as to whether that lodestar calculation is sufficient and appropriate to serve the purposes for which Congress enacted fee-shifting provisions in selected federal legislation. Unless the trial judge's ultimate determination amounts to an "abuse of discretion," it should not be disturbed. *See City of Riverside*, _____ U.S. at _____, 106 S. Ct. at 2700 (Powell, J., concurring).

In this case, of course, the size of the award, even after the application of the multipliers, was extremely modest compared with the benefits accruing to some six million Pennsylvanians from DVCCCA's work. Judge Bechtle determined that this fee was reasonable given the nine years of sacrifice and exemplary service of DVCCCA's attorneys — work for which they have yet to

receive one cent. This decision was well within the discretion with which he was vested by Congress to determine a fee award which, by reasonably compensating the attorneys for their accomplishments and sacrifices, will attract competent counsel to undertake similar meritorious litigation.

CONCLUSION

For the foregoing reasons, DVCCCA respectfully requests that this Court affirm the district court's decision to double its lodestar calculations for three of nine phases of the litigation in order to reflect the tremendous risk of non-payment overcome by DVCCCA's attorneys and thereby to provide an incentive for other attorneys to represent citizens as private attorneys general enforcing such important federal legislation.

Respectfully submitted,

James D. Crawford
Joyce S. Meyers
William J. Maffucci
Attorneys for Delaware Valley Citizens' Council For Clean Air, et al.

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, Pennsylvania 19103

Of Counsel.

September 24, 1986.

REPLY

BRIEF

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No. 85-5

In The
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COMMONWEALTH OF PENNSYLVANIA et al.,
Petitioners

v.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR et al.,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

REPLY BRIEF ON REARGUMENT

JAY C. WALDMAN
Special Counsel

HENRY G. BARR
General Counsel

JOHN P. KRILL*
Executive Deputy
General Counsel

JOHN M. HRUBOVCAK
Assistant Counsel

Attorneys for
Petitioners

Office of General Counsel
Commonwealth of Pennsylvania
P. O. Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

*Counsel of Record

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ARGUMENT

I. THE USE OF CONTINGENCY MULTIPLIERS IS INCONSISTENT WITH THIS COURT'S DECISION IN BLUM V. STENSON.

In its Supplemental Brief, Respondent Delaware Valley Citizens' Council for Clean Air ("Delaware Valley") contends that contingency or risk of loss is not reflected in the hours expended or, usually, in the hourly rate, and is therefore excluded from the lodestar. The Commonwealth submits that the opposite is true.

The risk of losing a meritorious case is the risk of failing to master complex facts or novel issues, or adequately to prepare and present a case. These are the very factors which are subsumed in the

lodestar calculation because they result in an increased expenditure of hours. Moreover, the risk of non-payment is itself a factor in the full hourly market rate employed in the lodestar calculation. See Brief for the United States at 26-27 and Ridenour v. Montgomery Ward and Company, 786 F.2d 867 (8th Cir. 1986) (recognizing that the contingent nature of the case and the risk of receiving no fee are factors normally inherent in the lodestar).

Some portion of the hourly rates set by private law firms, comporting with economic reality, invariably reflects loss of time or money from non-payment, partial payment, delayed payment and non-recovery in true contingent fee cases. Indeed, these rates are often reduced by lawyers handling matters for those private clients who pay fully and promptly.

In an effort to overcome the weakness of its position, Delaware Valley now seeks to redefine "contingency" in this case. It now asserts that "the contingency arose, pure and simple, from the superior resources of the Commonwealth . . . ." Supplemental Brief of Respondent at 6. We are now told that contingency results from a determined defense by a defendant with substantial resources.[1] In so contending, Delaware Valley plainly confuses the difficulty of litigating a hard-fought case with the risk of losing a case. Clearly, the more tenacious the defense or the more protracted the litigation, the greater will be the number of hours

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1. Delaware Valley fails to mention that under the Canon of Ethics every lawyer has an obligation to represent his client "zealously within the bounds of the law." ABA, Code of Professional Responsibility, Canon 7. Certainly, the Commonwealth should not be penalized for pursuing a vigorous defense.

expended that will be included in the lodestar calculation.

Also, for the first time, Delaware Valley seeks to justify the substantial contingency fee enhancement in this case on the basis of delay in payment. Here again, Delaware Valley attempts to redefine contingency to fit the facts in this case and to accommodate the weaknesses inherent in its earlier argument. In so doing, it has misconstrued completely the concept of contingency. The fact of receiving delayed payment is entirely different from the risk of receiving no payment.

Whether or how delay of payment should be considered in a fee award is not at issue in this case. This is a new contention, refuted by the record, which

shows that Delaware Valley requested and received a multiplier only for phases IV, V and VII of the litigation (Pet. App. 1a-45a). Delay in payment could not have been a factor since no multiplier was requested for the earlier phases of litigation. Delaware Valley, moreover, received full payment in 1978 for its attorney's fees for the first stage of the litigation. When a fee award is delayed because of a tenacious defense on the merits of a case -- as Delaware Valley contends here -- counsel will receive additional fees for the additional hours thus expended.

Thus, fee enhancement for contingency, however defined, would in fact result in the type of double-counting this Court condemned in Blum v. Stenson, 465 U.S. 886 (1984).

II. THE USE OF CONTINGENCY MULTIPLIERS IS ALSO INCONSISTENT WITH THIS COURT'S DECISIONS IN RUCKELSHAUS V. SIERRA CLUB AND HENSLEY V. ECKERHART.

As demonstrated in the main and supplemental briefs of the Commonwealth, in the brief of the United States, and in the brief of the twenty-six states (and Guam) amici curiae, a contingency multiplier violates the intent of Congress that fees be awarded only to prevailing parties, since such a multiplier unavoidably compensates plaintiffs' counsel for cases they lost.

Congress clearly intended fees to be awarded only to prevailing parties and, then, only for those distinct claims on which they prevailed. Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983); Hensley v. Eckerhart, 461 U.S. 424 (1983).

Delaware Valley argues that the award of contingency multipliers does not compensate counsel for other losing cases. Significantly, the amici twelve law firms contradict this contention. In the statements of interest in their brief, these firms admit that they rely on receiving fee multipliers from defendants in some cases to finance their capability to sue other defendants in unrelated cases. All of these firms describe long-term cash-flow concerns that relate not just to one particular case, but to their overall practice. Those non-prevailing defendants who are assessed fee multipliers are ultimately the means "to level the peaks and valleys caused by the firm's civil rights litigation." Brief of twelve firms at 20.

Amicus American Bar Association ("ABA") recognizes this reality but

attempts to evade it by arbitrarily characterizing as "small" the number of "losing lawyers who also represent winning parties whose losses may be tempered by enhanced fees." Brief of ABA at 19. Amicus fails to cite any empirical data to support this characterization. In any event, this "tempering of losses" means simply that defendant A subsidizes plaintiff's counsel for cases lost against defendants B, C and D. It violates Congress's intent to authorize a fee award only to a prevailing party.

Indeed, even one Circuit which elected to continue its practice of allowing contingency multipliers, pending this Court's decision in the instant case, recognized that such a multiplier may compensate attorneys for work performed on

losing cases. Lattimore v. Oman Construction, 795 F.2d 930 (11th Cir. 1986).

Finally, even if we were to accept the theoretical concept that a contingency multiplier compensates a lawyer for his risk of loss in only one particular case, it would still be illogical and inappropriate. If, as this Court held, in Hensley v. Eckerhart, it is improper to award any fee to a partially prevailing plaintiff for work performed on losing claims, a fortiori it would be improper to use the likelihood of losing to justify fee enhancement for work performed on prevailing claims. Imagine, for example, a plaintiff with two claims each of which has a 50% probability of success. This plaintiff fails on one and prevails on the other. Under Hensley, counsel would

receive absolutely no fee on the losing claim, but, under the theory of contingency multiplication, would receive double compensation on the prevailing claim. One cannot possibly distinguish such an award from improper compensation for work on a losing claim. Yet this result would be mandated by the scheme of compensation Delaware Valley urges upon this Court.

III. THE USE OF CONTINGENCY MULTIPLIERS INVITES MARGINAL LITIGATION AND THE AWARD OF WINDFALL FEES TO ATTORNEYS.

The intent of Congress in enacting the fee-shifting statutes was to provide an adequate incentive for competent lawyers to represent federal rights plaintiffs in meritorious cases. See S. Rep. 91-1196, 91st Cong., 2nd Sess. 38 (1970). Congress clearly did not intend thereby to penalize defendants or to generate windfall fees for lawyers. Blum v. Stenson.

Delaware Valley offers four reasons why "frivolous litigation will not be promoted" by the use of contingency multipliers. Supplemental Brief of Respondent at 9-10. Its basic contention as well as its reasoning miss the mark.

Congress was interested in promoting "quality" cases, not merely non-frivolous cases. See S. Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970).

Federal Rule of Civil Procedure 11, cited by Delaware Valley as an adequate deterrent, is neither designed nor adequate to ensure the pursuit of only quality litigation. Indeed, the rule was recently amended because it was ineffective in deterring even frivolous cases. See Official Comments to 1983 Amendment to Fed. R. Civ. P. 11; 6 Wright and Miller, Fed. Practice and Procedure: Civil §1334. As amended, the rule is still aimed only at litigation which is abusive, vexatious and initiated in bad faith or in disregard of relevant legal principles. In re TCI Limited., 769 F. 2d 441, 445 (7th Cir.

1985). It does not prevent the pursuit of marginal cases in quest of windfall fee awards.

Delaware Valley cites the prohibition of fee awards to non-prevailing parties as another reason why multipliers will not invite marginal litigation. This contention is simply incredible where such multipliers are based on the likelihood that a prevailing party, in retrospect, would fail.

Delaware Valley also argues that judges are unlikely to conclude that a party's likelihood of success was slim where it was in fact victorious. Yet, this is precisely what happened in this case and can continue to happen absent appropriate action by this Court. In even advancing this contention, Delaware Valley

implicitly acknowledges the irrationality of the process of imposing contingency multipliers.

Fourth, Delaware Valley argues that, since lower courts have yet to impose massive multipliers for extremely low likelihood of success, this Court should take no action to proscribe a practice the very rationale for which invites such a result. In multiplying fees by up to 250%, the lower courts have been awarding substantially enhanced fees for risk of loss. Indeed, the fee award in this case would have provided counsel with the equivalent of hourly rates of up to $400 or compensation for 1700 hours of legal work never performed.

This kind of fee enhancement clearly provides windfall awards to lawyers. The

enlargement of fees in proportion to the dubiety of prevailing clearly provides an incentive to litigate marginal claims.

IV. CONTINGENCY MULTIPLIERS ARE NOT NECESSARY TO ATTRACT COUNSEL TO FEDERAL RIGHTS CASES.

In its attempt to justify this unfair and illogical practice Delaware Valley suggests that a multiplier for risk of loss is needed to attract capable lawyers to meritorious statutory-fee cases. There is no evidence to support this contention, either generally or in the record of this case. Indeed, Delaware Valley concedes that there is an "absence of empirical evidence" to prove the need for contingency multipliers. Supplemental Brief of Respondent at 11.

The purpose of a fee-shifting statute is not to guarantee prevailing counsel the equivalent of the top dollar that the most sought-after attorney might receive in the most lucrative private case. At least

until such time as virtually all competent lawyers are fully occupied with work for clients who will promptly pay a full hourly market rate, the prospect of a lodestar fee provides very adequate assurance of capable counsel for federal rights plaintiffs with meritorious cases. A meritorious case is, by definition, one in which counsel is likely to prevail, with adequate preparation, presentation, diligence and perseverance.

The brief of the amici twelve law firms is itself evidence that there are numerous, competent lawyers who are not reluctant to set aside other business to take federal rights cases. Amicus ABA, furthermore, concedes in its brief, at 11, that Congress, simply by assuring that an attorney will be paid if his client prevails, eliminated some of the

disincentive to taking these cases. The ABA also concedes that lawyers "may often undertake certain representations as pro bono matters, either gratis or at a reduced fee." Brief of ABA at 11, n. 15. Indeed, prominent and highly capable counsel have represented civil rights plaintiffs, often under adverse conditions, long before the advent of the contingency multiplier.

In an effort to deny the apparent lack of need for contingency multipliers, Delaware Valley misconstrues the Commonwealth's position on available statistical data and the holdings of the Circuits. It purports to see no difference among the Circuits on the allowance of a multiplier for risk of loss. The ABA brief, however, at Appendix A, corroborates the Commonwealth's

contention that the Seventh and District of Columbia Circuits have for over two years questioned the appropriateness of risk enhancement. The amici twelve law firms, at 38, also acknowledge that these Circuits have "restricted compensation for risk of loss." The data offered by the amici twelve firms at 37-38, regarding recent small fluctuations in civil rights filings nationwide as a percentage of total federal court civil filings, are irrelevant in view of the fact that the Seventh and District of Columbia Circuits continue to have the highest ratios of private civil rights filings to total civil filings among the Circuits. See Supplemental Brief of the Commonwealth at 11.

V. DELAWARE VALLEY CANNOT JUSTIFY THE SIZE OF ITS FEE AWARD ON THE BASIS OF THE NUMBER OF PERSONS PURPORTEDLY BENEFITED BY ITS EFFORTS.

Delaware Valley cites "the benefits accruing to some six million Pennsylvanians from DVCCCA's work" to justify the size of its fee award. Supplemental Brief of Respondent at 12. One may question how beneficial Pennsylvania's citizens perceived Delaware Valley's actions to be when many of them publicly expressed outrage over them and their elected officials in all three branches of government expressed reservations about them. Even assuming such benefit, however, Delaware Valley's justification fails.

This Court stated in Blum v. Stenson, "[n]or do we believe that the number

of persons benefited is a consideration of significance in calculating fees . . . . Presumably counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed in protecting the civil rights of a single individual." 465 U.S. at 900, n. 16. This is in accord with the Canons of Ethics, which obligate every lawyer to use his best efforts on behalf of each and every client. ABA, Code of Professional Responsibility, Canon 7.

CONCLUSION

Petitioner requests this Court to rule that risk of loss cannot be used as a factor in increasing the basic fee award.

Respectfully submitted,

JAY C. WALDMAN
Special Counsel

HENRY G. BARR
General Counsel

JOHN M. HRUBOVCAK
Assistant Counsel

JOHN P. KRILL
Executive Deputy
General Counsel
(Counsel of Record)

Attorneys for Petitioner

Office of General Counsel
Commonwealth of Pennsylvania
P. O. Box 11775
Harrisburg, Pennsylvania 17108
(717) 783-6563

AMICUS CURIAE

BRIEF

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COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR

EUGENE C. THOMAS
(Counsel of Record)
President,
American Bar Association,
750 N. Lake Shore Dr.,
Chicago, Illinois 60611
(312) 988-5000

Attorney for the American Bar Association as Amicus Curiae

JOHN R. HUPPER
THOMAS D. BARR
STEPHEN S. MADSEN
JAMES L. BUCHAL
JOHN H. PICKERING
SARA-ANN DETERMAN

Of Counsel

September 22, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-5

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR

INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is the leading national membership organization of the legal profession, counting as members more than 320,000 lawyers throughout the United States. The ABA's membership includes many lawyers who regularly represent plaintiffs in civil rights, antitrust and other types of federal litigation in which, by statute, the court is empowered to award a "reasonable attorney's fee" to the prevailing party. For such practitioners, such a statutory fee award is often the only, or the only significant, prospective source of compensation for services performed. The ABA's membership also encompasses many attorneys who represent

plaintiffs in fee-shifting cases primarily on a *pro bono* basis and who rarely, if at all, accept employment on a contingent basis. Although the perspectives of these portions of its membership differ, the ABA believes that all of its members have a strong interest in the proper application of federal fee-shifting statutes and that the principle at issue in this Court is one as to which its members are in substantial accord: where a lawyer's compensation depends upon his client's success, he may permissibly charge, and in a fee-shifting case may permissibly be awarded, a larger fee than where his compensation is not thus contingent.

As the national organization of the bar, the ABA has long promulgated standards for professional responsibility among attorneys, including standards governing the fees that attorneys may permissibly charge for their services. ABA ethical guidelines provide that in setting a reasonable fee, an attorney may take into account the contingency of ultimate payment and may permissibly charge more for his services where payment is contingent on success. The ABA's ethical guidelines, including specifically the principle that contingency of payment may justify greater compensation, have long been employed by the courts in their application of federal fee-shifting statutes. The ABA has also contributed to the development of federal fee-shifting statutes,[1] and it strongly favors the use of its ethical guidelines in determining reasonable fees thereunder.

The practical interest of the ABA's members in the proper application of fee-shifting statutes, the commitment of the ABA and its members to the development of proper ethical standards for attorney compensation and the ABA's involvement in the development of federal fee-shifting legislation give the ABA a strong interest in this case as *amicus curiae*.

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[1] *See, e.g.*, ABA, *Summary of Action of the House of Delegates* 7 (Midyear Meeting, Feb. 13-15, 1978) (recommending legislation providing for recovery of reasonable attorneys' fees in certain cases where private parties substantially prevail against the federal government); ABA, *Summary of Action of the House of Delegates* 19 (Annual Meeting, Aug. 5-6, 1980) (recommending legislation establishing uniform principles for regulation of attorneys' fees in proceedings conducted before federal administrative agencies).

INTRODUCTION AND SUMMARY OF ARGUMENT

Ethical standards promulgated by the ABA have long recognized that the risk that an attorney will not be compensated for his services may justify a greater attorney's fee than would be appropriate where the risk of nonpayment is not present. Many courts have adopted the ABA's standards in determining awards of attorneys' fees under federal fee-shifting statutes, and many of them have concluded that the "reasonable attorney's fee" commonly mandated by such statutes may contain some factor of enhancement above the basic "lodestar" amount to reflect and compensate for the risk of nonpayment. Further, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), the legislative history of which is persuasive in interpreting other federal fee-shifting statutes, Congress endorsed the reasoning of decisions which in substance adopted the ABA standards and determined that fee awards reflecting such an enhancement are "reasonable".

Where a particular representation entails an unusual risk of nonpayment, the establishment of a "reasonable attorney's fee" which contains such an enhancement factor serves the vital policy, common to virtually all federal fee-shifting statutes, of attracting competent representation for selected federal claims. Properly administered, such an adjustment of the "lodestar" fee does not create any danger of windfall payments to attorneys and will not encourage groundless suits. Rather, the adjustment serves to motivate counsel to take fee-shifting cases which pose a comparatively great risk of nonpayment to the attorney and would, therefore, otherwise go unrepresented.

Judicially-manageable standards exist for determining the proper occasion for risk-based enhancement. The court should first examine the fee arrangements agreed upon by attorney and client to determine whether those arrangements enabled the attorney to mitigate the risks associated with employment where he would be paid only if successful. The court may also consider specific facts concerning the nature of the case and of the attorney's practice which may have heightened the economic risk associated with a particular representation. This analysis will frequently negate any claim of risk. Where a particular representation entailed significant economic risk for the attorney, however, enhancement should be granted.

ARGUMENT

THE "REASONABLE ATTORNEY'S FEE" PERMITTED BY FEDERAL FEE-SHIFTING STATUTES MAY PROPERLY INCORPORATE A FACTOR OF ENHANCEMENT TO COMPENSATE ATTORNEYS FOR ACCEPTING A SIGNIFICANT RISK OF NONPAYMENT.

The issue before this Court is a narrow one: whether an award of "reasonable attorney's fees", calculated on the "lodestar" basis under federal fee-shifting legislation, may contain a factor of enhancement based on the fact that the attorney would be compensated only if his client prevailed.[2]

In the developing jurisprudence of attorney compensation under fee-shifting statutes, few concepts are more pervasive than that an award of "reasonable attorney's fees" may contain an element of enhancement reflecting the fact that the pre-

[2] The Court has framed the issue both as "whether attorney's fees chargeable to a losing defendant under the Clean Water Act and the comparable statutes may be enhanced based on the risk of loss . . .", *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088, 3100 (1986), and as "whether a presumptively reasonable attorneys' fee award under Section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), may be 'multiplied' or otherwise enhanced to reflect the risk that plaintiffs might not have prevailed and, therefore, might have obtained from defendants no attorneys' fees at all", *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3331 (1986) (order restoring case to calendar for reargument). Although the formulation of the issue presented in this brief is not limited to the Clean Air Act, we believe it is substantially equivalent to those adopted by the Court. As the Court has noted, most federal fee-shifting legislation provides for the award of a "reasonable attorney's fee" to the prevailing party, and the standards to be applied under different fee-shifting statutes are substantially similar. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. at 3095-96; *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). The issue is framed herein in terms of the propriety of an "enhancement" factor, as opposed to the use of a "multiplier", because, as discussed below, the lower courts which have awarded enhancement have generally done so in an amount considerably less than any whole-number multiple of the "lodestar" amount.

vailing party's counsel, in undertaking the representation, also undertook a substantial risk of nonpayment. *See Manual for Complex Litigation, Second* § 24.12, at 181-82 (1985).[3] Nothing in the federal fee-shifting statutes, their history or the policies they serve should justify abandonment of this settled principle.

A. Ethical Precepts, Judicial Precedent and Congressional Action All Support the Propriety of Risk-Based Enhancement of Statutory Fee Awards.

The ABA has long proposed model standards of professional responsibility for attorneys, including standards which address the fees that attorneys may permissibly charge for their services. From the beginning of this century, the ABA has recognized that when an attorney accepts representation with the understanding that he will be compensated only if his client prevails, he may reasonably charge a premium if his client does in fact prevail.

Thus, as first promulgated in 1908, the ABA Canons of Professional Ethics recognized that "[i]n determining the amount of the fee, it is proper to consider . . . the contingency or the certainty of the compensation".[4] Expressing the same

[3] As a practical matter, such enhancement may be provided either by adjusting the "lodestar" figure itself or by increasing the hourly rate used in computing the "lodestar". Although courts have sometimes used the latter approach, *see Northcross v. Board of Education*, 611 F.2d 624, 638-39 (6th Cir.), *cert. denied*, 447 U.S. 911 (1979), the former approach is far more prevalent and is the premise for the discussion in this brief. Of course, where hourly rates already contain a factor of enhancement for the risk of nonpayment, further enhancement will not be justified. *See Jones v. Central Soya Co.*, 748 F.2d 586, 592-93 (11th Cir. 1984); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc). Ordinarily, however, hourly rates used in computing the "lodestar" are those charged to clients who pay contemporaneously. *E.g., id.*

[4] Canons of Professional Ethics, Canon 12(5), *reprinted in* ABA, *Canons of Professional and Judicial Ethics* 10-11 (1957). Canon 12 was adopted by the ABA in 1908 as part of its first comprehensive code of professional ethics for attorneys. 33 ABA, *Reports of the*

principle through somewhat different language, the ABA Model Code of Professional Responsibility, which became the basic source of the law of professional responsibility in virtually every American jurisdiction, *see Nix v. Whiteside,* 106 S. Ct. 988, 995 n.4 (1986), provides that one of the "[f]actors to be considered" in determining a reasonable fee is "[w]hether the fee is fixed or contingent". Model Code of Professional Responsibility DR 2-106(B) (1980).[5] The ABA's most recently formulated ethical standards, the ABA Model Rules of Professional Conduct, continue to reflect a consensus among lawyers that "whether the fee is fixed or contingent" is one of "[t]he factors to be considered in determining the reasonableness of a fee". Model Rules of Professional Conduct Rule 1.5(a)(8) (1984).[6]

American Bar Association 578 (1908). *See also id.* at 61 (adopting Canon 12). *See generally* F. MacKinnon, *Contingent Fees for Legal Services* (1964) (A Report of the American Bar Foundation).

[5] DR 2-106(B) provides in part:

> "Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent."

[6] Although the ABA has not always expressly cited the "contingency" factor in its official statements concerning possible legislation relating to statutory fees awards, *see Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. 297 (1975) (resolution of ABA concerning federal

Courts have long looked to ABA guidelines in determining the amount of reasonable statutory fee awards and, consistent with DR 2-106(B)(8) and Model Rule 1.5(a)(8), they have repeatedly held that the contingency of payment may justify an enhanced award. In *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), one of the earliest and most influential fee-shifting cases, the Fifth Circuit adopted the factors set forth in DR 2-106 as guidelines for determining the size of attorneys' fee awards under Title VII of the Civil Rights Act of 1964, including specifically "whether the fee is fixed or contingent". *Id.* at 718 (emphasis omitted).[7] Furthermore, although the "lodestar" methodology of *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 487 F.2d 161, 167-68 (3d Cir. 1973), has in many respects supplanted the *Johnson* analysis, *see Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 106 S. Ct. 3088, 3097-98 (1986), courts which follow the "lodestar" approach (including the *Lindy* court itself, *see* 487 F.2d at 168) have generally recognized that the economic risk assumed by the attorney is a factor independent of the "lodestar" and may, in a proper case, justify enhancement of the "lodestar amount".[8] At

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limitations on attorneys' fees), it has never excluded that factor from consideration in determining the proper amount of such an award, and specific reference to the factor seems to have been omitted simply because fee-shifting cases are in most instances contingent in character, *see id.* The ABA has always viewed contingency as a factor to be considered in determining an appropriate attorney's fee. *See* Model Rules of Professional Conduct Rule 1.5(a)(8) (1984); Model Code of Professional Responsibility DR 2-106(B)(8) (1980); Canons of Professional Ethics, Canon 12(5), *reprinted in* ABA, *Canons of Professional and Judicial Ethics* 10-11 (1957).

[7] The twelve factors identified in *Johnson* simply constitute a restatement of the eight factors in DR 2-106 and Model Rule 1.5, with one additional factor: the "undesirability" of the case. *Compare Johnson,* 488 F.2d at 719, *with* DR 2-106(B).

[8] In awarding enhancement on the basis of what is often called the "contingency" factor, courts have sometimes seized on the fact that the attorney took the case on a contingent fee basis, rather than

present, the Courts of Appeals, with only two arguable exceptions, hold that in an appropriate case a statutory award of "reasonable attorney's fees" may include some enhancement based on the risk of nonpayment.[9]

Furthermore, Congress has recognized that the factors cited in *Johnson,* including specifically the contingency of payment, provide appropriate guidelines for determining reasonable attorney's fees under federal fee-shifting statutes. In the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), a persuasive authority in the interpretation of other fee-shifting legislation

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conducting a more searching analysis of the economic risks actually undertaken by the attorney. *See, e.g., Williams v. Heard,* 568 F. Supp. 89, 91 (S.D. Tex. 1983) (enhancement granted "[p]articularly due to the nature of the contract involved—contingency fee"). This confusion is perhaps understandable in view of the distinction drawn in DR 2-106 and Model Rule 1.5 between "fixed" and "contingent" fees. Properly understood, however, the "contingency" factor refers merely to the fact that the attorney will be paid only if his client is successful, and the pertinent inquiry concerns the degree of economic risk to which the attorney has exposed himself by undertaking representation on such a basis. *See Wildman v. Lerner Stores Corp.,* 771 F.2d 605, 613 (1st Cir. 1985) ("actual risks or burdens that are borne by the lawyer" determine enhancement, not "mere fact" of contingent fee contract); *Copeland v. Marshall,* 641 F.2d at 893 (contingency adjustment "entirely unrelated" to contingent fee contract). As discussed further below, the existence of a contingent fee contract will often mitigate an attorney's economic risk by increasing his compensation if successful. *See infra* pp. 19-20.

[9] A table collecting leading cases from each circuit is annexed hereto as Appendix A. The two seeming exceptions are the District of Columbia Circuit, *see Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4, 28-29 (D.C. Cir. 1984) (questioning propriety of enhancement), *cert. denied,* 105 S.Ct. 3488 (1985), and the Seventh Circuit, *see McKinnon v. City of Berwyn,* 750 F.2d 1383, 1392-93 (7th Cir. 1984) (questioning propriety of enhancement). Neither circuit has rejected enhancement in all circumstances, and the Seventh Circuit seems still to hold that enhancement may be awarded in a proper case. *See Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.,* 776 F.2d 646, 661 (7th Cir. 1985).

(*see supra* note 2), Congress cited the factors identified in *Johnson* as "appropriate standards" for determining fees. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976); *see* H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 8 (1976). Moreover, as an example of a decision "correctly appl[ying]" the *Johnson* factors, Congress expressly cited the district court decision in *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd,* 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds,* 436 U.S. 547 (1978), in which the district court concluded that it "must increase the [lodestar amount] . . . to reflect the fact that the attorney's compensation, at least in part, was contingent in nature". *Id.* at 686.

Congress's acceptance of risk adjustment in statutory fee awards is further indicated by its admonition that fee awards under Section 1988 should be equivalent to those awarded "in other types of equally complex Federal litigation, such as antitrust cases". S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976). Prior to the enactment of Section 1988, federal courts awarding attorneys' fees in antitrust cases frequently permitted an upward adjustment in the fee to compensate for the contingency of payment.[10] Similarly, in other types of "complex Federal litigation" where fee-shifting was then permitted, courts often took account of the contingency of payment in determining a reasonable fee.[11] As stated by Judge Wyzanski in

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[10] *See, e.g., Lindy Bros. Builders,* 487 F.2d at 168; *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 471 (2d Cir. 1974); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1210 (9th Cir. 1975), *cert. denied,* 425 U.S. 959 (1976); *Arenson v. Board of Trade,* 372 F. Supp. 1349 (N.D. Ill. 1974). *But see Farmington Dowel Products Co. v. Forster Manufacturing Co.,* 421 F.2d 61, 90 (1st Cir. 1969).

[11] *See, e.g., National Treasury Employees Union v. Nixon,* 521 F.2d 317, 322 (D.C. Cir. 1975) (labor law class action); *Pete v. UMW Welfare & Retirement Fund of 1950,* 517 F.2d 1275, 1290 (D.C. Cir. 1975) (en banc) (similar); *Green v. Transitron Electronic Corp.,* 326 F.2d 492, 496 (1st Cir. 1964) (securities class action); *Angoff v. Goldfine,* 270 F.2d 185, 189 (1st Cir. 1959) (similar); *In re Osofsky,* 50 F.2d 925, 927 (S.D.N.Y. 1931) (bankruptcy).

one such case, decided under the federal securities laws more than 20 years ago, such enhancement is permissible because:

> "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Cherner v. Transitron Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963), *modified and aff'd sub nom. Green v. Transitron Electronic Corp.*, 326 F.2d 492 (1st Cir. 1964).

Finally, although risk-based enhancement of the "lodestar" in fee awards has been widely available in the years since the Civil Rights Attorney's Fees Awards Act was passed (*see generally* 2 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 16.04[2] (1985) (collecting cases)), Congress has over those years enacted a wide variety of fee-shifting statutes on various subjects, and it has not prohibited risk-based enhancement in any of them.[12] If Congress had wished to eliminate the possibility of such enhancement of court-awarded fees, it could have done so,[13] yet it did not. That Congress has not precluded the widespread practice of risk-based enhancement in any of the many subsequently enacted statutes permitting the award of a "reasonable attorney's fee" strongly indicates its acceptance of enhancement in an appropriate case.

Setting a "reasonable attorney's fee" which includes some enhancement on the basis of the risk of nonpayment is thus a well-recognized phenomenon under fee-shifting legislation. It

[12] *See, e.g.*, National Cooperative Research Act of 1984, 15 U.S.C. § 4304(a)(1) (Supp. III 1985) ("substantially prevailing claimant" to be awarded "a reasonable attorney's fee"); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (1982) (attorney fees awarded "whenever the court determines such award is appropriate"); Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 6104(e)(1) (1982) ("reasonable attorney's fee" to the "prevailing plaintiff").

[13] *Cf.* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1982) (in suits against United States, "attorney fees shall not be awarded in excess of $75 per hour").

is also essential to the purpose of such legislation, as is shown below.

B. Risk-Based Enhancement Is Necessary to Effectuate the Policy of Fee-Shifting Statutes.

Federal fee-shifting statutes make an exception to the usual American rule, requiring each party to bear its own attorney's fees, as a means of encouraging private parties to pursue litigation that will advance important federal interests. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).[14] Such statutes rest on a congressional perception that, in many instances, prospective litigants seeking to vindicate these federal interests will be unable to offer firm assurances of payment to attorneys who might represent them, and that an attorney will naturally prefer representations where payment of his fee is not in question. *See, e.g.*, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1-3 (1976).[15]

By assuring that the attorney will be paid if his client prevails, statutory fee awards eliminate some of the disincentives to accepting these representations. Nonetheless, as Congress has recognized (*see supra* pp. 8-10), the prospect of a fee award does not eliminate all economic disincentives. All

[14] Fee-shifting is permitted, for example, in private litigation concerning such vital matters as civil rights, *see* 42 U.S.C. § 1988 (1982), environmental protection, *see* 42 U.S.C. § 7604(d) (1982), and voting rights, *see* 42 U.S.C. § 1973*l* (e) (1982).

[15] Of course, attorneys may often undertake certain representations as *pro bono* matters, either *gratis* or at a reduced fee. Courts have, however, repeatedly rejected the argument that an attorney merits diminished compensation when proceeding on that basis. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984) (courts ought to avoid "decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return") (quoting *Stanford Daily*, 64 F.R.D. at 681); *Copeland v. Marshall*, 641 F.2d at 900 ("Nor is it relevant that a law firm, as in this case, originally undertook representation *pro bono publico*".).

other things being equal, an attorney will naturally prefer representation for which he will be paid regardless of the outcome to that for which he will be paid only if his client wins; cases of the latter type are inherently riskier for the attorney, and an attorney may properly expect greater compensation for their successful prosecution.[16] In addition, the contingency of payment may greatly increase the economic risks associated with a given case. For example, it may be apparent that the litigation will be particularly lengthy and the payment of fees therefore substantially delayed, or will require employment of additional personnel whose salaries must be advanced pending an ultimate award, or will crowd out other paying work. *See infra* pp. 21-22.

To the extent that an ultimate award of fees does not compensate for the economic risks associated with contingent employment, attorneys will in the long run lack sufficient incentive to take such cases.[17] This would defeat the basic goal

[16] *E.g., Lindy Bros. Builders,* 487 F.2d at 168 (quoting *Cherner v. Transitron Electronic Corp.,* 221 F. Supp. at 61).

[17] *See Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.,* 776 F.2d at 662 (risk adjustment "provides an inducement for lawyers to accept meritorious cases that might otherwise go unheard"); *accord, Lewis v. Coughlin,* No. 85-2195, slip op. at 5695 (2d Cir. Sept. 10, 1986). *See also Yates v. Mobile County Personnel Board,* 719 F.2d 1530, 1534 (11th Cir. 1983):

> "Vindication of the policy of the law depends to a significant degree on the willingness of highly skilled attorneys, such as those now before the court, to accept employment in discrimination cases on a wholly contingent basis. They will hardly be willing to do so if their potential compensation is limited to the hourly rate to which they would be entitled in noncontingent employment. Busy and successful attorneys simply could not afford to accept contingent employment if those were the rules that were applied. The enforcement of our civil rights laws would then be entrusted largely to less capable and less successful attorneys who lack sufficient employment. Such an arrangement would ill serve policies of enormous national importance."

of fee-shifting legislation, which is to assure " 'effective access to the judicial process' " for selected federal claims. *Hensley v. Eckerhart,* 461 U.S. at 429 (quoting H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976)). Ultimately, the substantive federal interests furthered by the procedural device of fee-shifting will be impaired. Thus, the prospect that a statutory fee award will compensate for the risk of nonpayment furthers the central objective of any fee-shifting regime.

The various objections raised to such risk-compensating enhancement do not justify any departure from the well-settled—and well-justified—rule permitting it.

C. The Objections Raised to Risk-Based Enhancement Lack Merit.

Opponents of enhancement raise several objections to the practice. Enhancement based on the risk of loss, it is argued, gives the greatest reward to those whose cases were the feeblest, thus penalizing defendants whose fault was slight while imposing no similar penalty on egregious wrongdoers. It is also asserted that enhancement will increase the amount of litigation generally and will both encourage and effectively subsidize baseless litigation. Enhancement is also thought to evade the statutory requirement that fees be awarded only to prevailing parties.[18]

On the necessity of compensating for risk as a means of attracting competent counsel, the commentators are in virtually unanimous accord. *See, e.g.,* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. Pa. L. Rev. 281, 324-25 (1977); Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 Yale L.J. 473, 474 (1981); Comment, *Adjusting Attorney Fee Awards Through Multipliers in Antitrust Class Actions,* 21 Houston L. Rev. 801, 843 (1984); *The Contingency Factor and the Attorney's Fees Awards Act of 1976: Legislative History Requires Continued Application,* 26 Santa Clara L. Rev. 193, 215 (1986); and Note, *Attorney Fees and the Contingency Factor Under 42 U.S.C. § 1988: Blum v. Stenson, 465 U.S. 886 (1984),* 64 Or. L. Rev. 571, 586-87 (1986).

[18] An additional objection, concerning the perceived absence of manageable standards for granting enhancement, is discussed at pp. 19-22, *infra.*

Implicit in these opposing arguments is the erroneous assumption that attorneys select a caseload from a readily available set of possibilities much in the way a bettor at the racetrack might select his daily bets from the racing card. But a lawyer's options and selection of cases have no similarity to that gambler's world or its "laws" of probability.

The specific objections raised to enhancement are, on proper analysis, not well-founded.

1. Rewarding Feeble Cases. Petitioners point out that many courts have viewed the relevant "risk of loss" as the degree of risk that particular legal or factual obstacles would bar a given plaintiff's recovery.[19] They stress both the difficulty and the potential unfairness of enhancing an award on the basis of *post hoc* judgments concerning the apparent strength of the plaintiff's case, and in particular they raise the prospect that risk "multipliers" will be awarded in inverse proportion to the strength of the plaintiff's case.

If the purpose of risk enhancement were to equalize the returns available to attorneys from different contingent cases, which have differing degrees of merit and thus differing chances of success, then petitioners' objections might have merit. Under such a system, a lawyer who took comparatively weak contingent cases would prevail infrequently, but could expect to receive comparatively large enhancements that would yield roughly the same aggregate compensation as would be received by an attorney who took stronger cases and prevailed more often, receiving smaller enhancements. But the purpose of enhancement is not to equalize returns from contingent cases in this manner, and a system faithful to the proper purpose of enhancement will not create the problems petitioners foresee.

As discussed above, enhancement compensates attorneys for accepting the risk of nonpayment associated with contingent

[19] *See, e.g., McKinnon v. City of Berwyn,* 750 F.2d at 1392-93; *Laffey v. Northwest Airlines, Inc.,* 746 F.2d at 26-29.

employment, a risk which does not exist in noncontingent cases. If there were no such prospect of enhanced compensation in contingent cases, then, from a strictly economic point of view,[20] and all other things being equal, attorneys would *always* prefer noncontingent employment to contingent employment, even in contingent cases of exceptional merit—for as every attorney knows, even the best case may fail. Thus, enhancement is not concerned with equalizing prospective returns among different contingent cases with different degrees of merit, but with placing contingent practice as a whole on roughly the same economic footing as noncontingent practice.[21] Because the goal of enhancement is to compensate for the risk of contingent payment as opposed to assured payment, and not to equalize returns among different contingent cases, the relative strength or weakness of the plaintiff's case should be a relatively subordinate concern in determining whether enhancement is appropriate.[22] In keeping with the purpose of enhancement, the

[20] As noted above, attorneys will often be motivated to take particular representations for noneconomic reasons, *see supra* note 15, and the ABA strongly endorses such activity, *see* Model Rules of Professional Conduct Rule 6.1 (1984). Nonetheless, fee-shifting statutes address attorneys' economic incentives, and noneconomic considerations may therefore be disregarded for purposes of analysis.

[21] Prevailing practice in the regulation of contingent fee contracts tends to confirm this analysis. Generally, the maximum permissible fee is the same for all (except "extraordinary") cases regardless of possible differences in merit. *See, e.g.,* N.Y. 1st Dep't R. 603.7(e); Ill. Ann. Stat. ch. 110, ¶ 2-1114 (Smith-Hurd Supp. 1986); Cal. Bus. & Prof. Code § 6146 (West Supp. 1986). *See generally* F. MacKinnon, *Contingent Fees for Legal Services* (1964).

[22] This is not to say that the likelihood of success can *never* be considered in determining the propriety of enhancement. There may, in fact, be a few unusual cases in which the "legal" risks confronting a particular cause were so great and apparent at the outset as to constitute an economic disincentive independent of that created by the basic contingency of payment. In such cases, enhancement may be justifiable as a means of attracting attorneys to undertake cases which prove to have merit despite overwhelming odds, just as in the law of contingent fee contracts, an attorney may, in an "extraordinary" case,

primary concern should be whether the attorney has been able to mitigate the risk of nonpayment associated with contingent practice and whether other economic factors may have aggravated that risk.[23]

2. Windfall Awards. There is also no reason to assume that the federal courts, sensitive to the "grave danger that the bar and bench will be brought into disrepute",[24] will make a practice of granting windfall fee awards if risk-based enhancement is permitted. Although such enhancement is now generally permitted, the lower courts have not permitted a "golden harvest" of excessive fees. On the contrary, such enhancement is granted only sparingly, and with apparent care and precision. *See* 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1803, at 508 (1986) (noting "virtual absence of empiric data showing any significant incidence of excessive fees"). For example, of the hundreds of reported decisions awarding fees under Section 1988 since this Court's decision in *Blum v. Stenson,* 465 U.S. 886 (1984), only 74 even consider the propriety of risk-based enhancement in the circumstances

take a percentage of the recovery exceeding the prescribed maximums, *see supra* note 21. Ordinarily, however, enhancement on this basis will not be justified. As this Court has previously observed, the existence of such considerations as exceptionally complex or difficult issues can usually be accounted for in the number of hours used in calculating the "lodestar" amount. *See Blum v. Stenson,* 465 U.S. at 898-99.

[23] Although some courts have focused primarily on the relative likelihood of success in determining the propriety of enhancement, *see generally* Leubsdorf, *supra* note 17, other courts have recognized, often implicitly, that enhancement should primarily reflect the attorney's inability to mitigate the risks associated with the fact of contingency in a given case. *See, e.g., Crumbaker v. Merit Systems Protection Board,* 781 F.2d 191, 196-97 (Fed. Cir. 1986); *Wildman v. Lerner Stores Corp.,* 771 F. 2d at 613-14; *Jones v. Central Soya Co.,* 748 F.2d at 593.

[24] *Lindy Bros. Builders,* 487 F.2d at 168 (quoting *Cherner v. Transitron Electronic Corp.,* 221 F. Supp. at 61).

presented, and only 26 have awarded enhancement in any measure.[25]

Further, the degree of enhancement actually awarded by the courts in civil rights cases has been far from extravagant. Of the 26 post-*Blum v. Stenson* cases awarding risk-based enhancement under Section 1988 discussed in the preceding paragraph, enhancement of 100% is the maximum reported, and the unweighted average of all enhancement factors employed was only approximately 32%. Similarly, in *Wildman v. Lerner Stores Corp.,* 771 F.2d 605, 613 (1st Cir. 1985), the First Circuit observed that during 1980-1985, for civil rights cases, enhancement of 100% was the maximum reported, and that enhancements of such magnitude had been awarded only three times. Moreover, it would appear that "multipliers" in excess of 100%, to the extent they have been employed at all, are primarily associated with awards in actions brought under the antitrust and securities laws, *see* 6 *Class Action Reports* 119-21 (March-April 1980) (table showing average "multiple" of 1.5 in antitrust and securities cases), and not with civil rights cases, *see Wildman v. Lerner Stores,* 771 F.2d at 613.[26]

3. Proliferating Litigation. Petitioners suggest that approval of risk adjustments will "generate a pool of legal fees sufficient to compensate all attorneys bringing all . . . suits",

[25] The 74 cases mentioned in the text are a subset of 120 cases found by the Lexis search "(§ 1988 or §1988) and attorney! fee and date aft 3/21/84 and ((risk or contingen!) w/25 (bonus or multipl! or adjust! or enhanc!))" conducted in the Genfed library, Courts file, on September 21, 1986.

[26] The experience of defendants also suggests that enhancement on this basis does not yield over-generous compensation. For example, a 1983 report by the auditor general of California states that in 1982, the state paid only $34,437 in statutory fee awards, at hourly rates ranging from $25 to $80 (as compared with $3.52 million in legal fees paid to its outside counsel, at hourly rates ranging from $23.75 to $275 an hour), and that it actually collected $47,720 in attorneys' fees through such awards. Study cited in Aron, *It's a Plan to Undermine Civil Rights,* 70 A.B.A.J. 16, 20 (Oct. 1984).

thus inducing lawyers and their clients to pursue every possible claim. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 27 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985). It is highly unlikely, however, that the enhancements actually awarded have generated "additional" fees sufficient to balance out even a fraction of uncompensated cases. As discussed above, enhancement is not awarded in the great majority of cases, and in those cases when it is granted, the typical enhancement factor would seem to be much less than 100%. Moreover, to the extent that the availability of enhancement in a proper case may increase the overall number of suits brought under statutes which permit fee-shifting, that result is perfectly consistent with—indeed, it is the goal of—congressional policy favoring the vindication of certain federal interests through private litigation. *See, e.g.*, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1-3 (1976).

4. Encouraging Baseless Litigation. As discussed above, the plaintiff's relative chances of success should not have great importance in a properly-implemented system of risk-based enhancement. Thus, under such a regime, there should exist little incentive for an attorney to bring a very weak case in the hope of extravagant reward if the case succeeds. Moreover, even if enhancement is permitted in a proper case, it will still be true that only prevailing parties will recover *any* fees, a fact which in itself provides a strong deterrent to "nuisance" litigation. And in fact, it is difficult to see why an attorney, confronted with two fee-shifting cases of apparently differing merit, would choose the weaker case if he will be compensated at all only if successful; the basic contingency of payment should deter baseless suits even if enhancement is available. To the extent that it does not, ethical principles, *see* Model Rules of Professional Conduct Rule 3.1 (1984); Model Code of Professional Responsibility DR 7-102 (1980), Rule 11 and other laws providing for sanctions, *see* Fed. R. Civ. P. 11; 28 U.S.C. § 1927 (1982), and the potential assessment of fees against losing plaintiffs, *see* 42 U.S.C. § 1988 (1982), would seem to provide ample correctives.

5. Compensating Losing Parties. Petitioners suggest that risk-based enhancement effectively compensates attorneys for cases in which their clients have not prevailed as well as those in which they have, in defiance of congressional intent that attorneys' fees should be recovered only in cases where the attorney's client is the "prevailing party".[27] But it is only by attenuated implication that any prohibition against awarding attorneys' fees to losing *parties* is defied—losing *parties* continue to receive nothing. It is only that small class of losing *lawyers* who also represent winning parties whose losses may be tempered by enhanced fees. This mitigation of financial loss is precisely the incentive required to persuade lawyers to take cases where payment is uncertain.

D. There Are Manageable Standards for Granting Risk-Based Enhancement.

A final objection to risk-based enhancement is the claimed absence of judicially manageable standards for determining whether enhancement should be granted. An approach which properly focuses on the economic risk assumed by the attorney should, however, be both fair and manageable.

As discussed above, risk-based enhancement compensates the attorney for accepting both the basic risk of nonpayment associated with fee-shifting cases and any more particularized economic factors, aggravating that basic risk, which may be associated with a given case. In adjudicating claims of enhancement, therefore, courts should evaluate both the extent to which the attorney has been able to mitigate the basic risk of nonpayment and the extent to which other factors may have aggravated it.

The attorney's contract with his client, if any, provides the principal method of mitigating the risk of nonpayment, and the court therefore must consider whether, and to what extent, the

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[27] *See Laffey v. Northwest Airlines, Inc.*, 746 F.2d at 27-28. *See also McKinnon v. City of Berwyn*, 750 F.2d at 1392.

contract achieved that end.[28] Attorneys whose clients have contracted to pay a "lodestar" fee regardless of the outcome have obviously avoided risk entirely, and enhancement is not justified.[29] Similarly, attorneys whose clients have agreed to pay some portion of the "lodestar", win or lose, have, *pro tanto,* reduced their risk.[30] An attorney who has entered into a contingent fee contract in a suit seeking substantial damages has also significantly reduced his risk, for he has obtained, in exchange for his acceptance of the risk of nonpayment, the prospect of compensation greater than the prospective "lodestar" amount.[31] Where the attorney's contract with his client has substantially reduced his risk by these or other means, enhancement will usually be inappropriate.

In many cases, however, attorney and client will have been unable to mitigate the risk of nonpayment by their contract. Particularly in cases under statutes where the public interest may be significantly aided by private litigation, the client may be unable to pay or unwilling to assume the risk of liability for payment, or the cause may be one which, by its nature, will not generate significant funds even if successful, such as an action for declaratory or injunctive relief, *see* H.R. Rep. No. 94-1558,

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[28] *See, e.g., Wildman v. Lerner Stores Corp.,* 771 F.2d at 614 (court must examine, inter alia, "what, if any, payment each attorney would have received had the suit not been successful").

[29] *See, e.g., Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.,* 776 F.2d at 660 (risk adjustment unwarranted where fee agreement not contingent). For these purposes, the credit risk associated with the particular client may be disregarded. *See Jones v. Central Soya Co.,* 748 F.2d at 593.

[30] *See, e.g., Stanford Daily v. Zurcher,* 64 F.R.D. at 686 (client agreed to pay $5,000 retainer and to undertake fund-raising effort).

[31] Thus, both contingent and noncontingent fee contracts reduce the attorney's economic risk. The noncontingent fee contract does so by providing for payment regardless of outcome, while the contingent fee contract does so by offering a significantly greater payment for a favorable outcome. *See Lewis v. Coughlin,* No. 85-2195, slip op. at 5695 (2d Cir. Sept. 10, 1986); *McKinnon v. City of Berwyn,* 750 F.2d at 1392-93.

94th Cong., 2d Sess. 9 (1976), or for small or nominal damages, *see Carey v. Piphus,* 435 U.S. 247 (1978). Where risk is thus undiminished, some enhancement is usually well-justified.

In addition, when considering a claim of enhancement, the court should examine aspects of the case that may have aggravated the attorney's economic risk. Chief among these are expected delay in payment, the degree to which risk is shared, and the preclusion of other work.[32]

Although some courts have treated delay in payment as a factor independent of the risk of nonpayment, *see, e.g., Crumbaker v. Merit Systems Protection Board,* 781 F.2d 191, 197 (Fed. Cir. 1986), it is more properly viewed as an element—often a substantial one—of the economic risk assumed in a given representation, *see, e.g., Copeland v. Marshall,* 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc). Extensive delays in resolution of a matter cause cash-flow problems and deprive the attorney of the use of money, magnifying the economic risk associated with the uncertainty of ultimate payment.[33] Further, certain types of litigation, such as litigation seeking to effect institutional reform, *see, e.g., Society for Good Will to Retarded Children v. Cuomo,* 103 F.R.D. 169, 171 (E.D.N.Y. 1984), and complex environmental litigation, *see generally* 1 F. Grad, *Treatise on Environmental Law* § 2.03[19][a], at 2-344 to 2-346 (1986), entail a potential for delay so exceptional and notorious as to be a significant disincentive to representation of plaintiffs in such actions unless some enhancement is available.

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[32] Direct evidence that other attorneys refused to take the case because of a risk of nonpayment could also be persuasive evidence that a case was unusually risky. *Lewis v. Coughlin,* No. 85-2195, slip op. at 5696 (2d Cir. Sept. 10, 1986); *Wildman v. Lerner Stores Corp.,* 771 F.2d at 614; *Tyler v. United States,* 602 F. Supp. 476, 480 (E.D. Mo. 1984).

[33] *Copeland v. Marshall,* 641 F.2d at 893; *Graves v. Barnes,* 700 F.2d 220, 222-23 (5th Cir. 1983). *See also Parker v. Lewis,* 670 F.2d 249 (D.C. Cir. 1982) ("[s]uch delays have the potential to dampen substantially attorneys' enthusiasm to undertake discrimination cases").

Second, courts have recognized that a given representation may pose greater economic risk for some lawyers than for others, and have held that the risk of a given case may properly be evaluated in light of the particular attorney's circumstances. Cases that can be expected to require employment of additional personnel or other significant advancement of funds are riskier than those which will not.[34] Similarly, courts have observed that particular litigation may pose greater risk to a small firm or sole practitioner, for the risk of nonpayment may be less well "hedged" by the existence of paying work.[35] On the other hand, as has also been noted, where work is shared among several firms, economic risk may be diminished.[36]

Finally, some cases may entail economic risks for the attorney independent of those associated with delay and the nature of the attorney's practice. For example, a case may entail potential conflicts of interest or foreclose participation in otherwise available business.[37] Similarly, a particular cause may be so unpopular as to expose counsel to the risk of loss of other business.[38] Although comparatively few cases will warrant enhancement on these grounds, enhancement should nonetheless be available where counsel has undertaken representation despite these risks.

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[34] *E.g., Craik v. Minnesota State University Board,* 738 F.2d 348, 350-51 (8th Cir. 1984).

[35] *See, e.g., Brewer v. Southern Union Co.,* 607 F. Supp. 1511, 1532 (D. Colo. 1985) (small firms); *Uzzell v. Friday,* 618 F. Supp. 1222, 1227 (M.D.N.C. 1985) (sole practitioner).

[36] *In re Fine Paper Antitrust Litigation,* 98 F.R.D. 48, 84 (E.D. Pa. 1983), *aff'd in part, rev'd in part and remanded,* 751 F.2d 562 (3d Cir. 1984).

[37] *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d at 719; Model Rules of Professional Conduct Rule 1.5(a)(2) (1984).

[38] *See York v. Alabama State Board of Education,* 631 F. Supp. 78, 85 (M.D. Ala. 1986) (court finds that "successful plaintiffs' civil rights lawyers" in Mobile, Alabama are "stigma[tized]" and "are not hired for other types of sophisticated federal litigation").

CONCLUSION

For the reasons stated above, the Court should specifically affirm that the "reasonable attorney's fee" permitted by federal fee-shifting legislation may, in an appropriate case, contain an element of enhancement to compensate for the risk of nonpayment assumed by plaintiff's counsel.

Respectfully submitted,

EUGENE C. THOMAS
(Counsel of Record)
President,
American Bar Association,
750 N. Lake Shore Dr.,
Chicago, Illinois 60611
(312) 988-5000

JOHN R. HUPPER
THOMAS D. BARR
STEPHEN S. MADSEN
JAMES L. BUCHAL

JOHN H. PICKERING

SARA-ANN DETER[illegible]N

Of Counsel

Attorney for the
American Bar Association
as Amicus Curiae

APPENDIX A
SURVEY OF THE COURTS OF APPEALS

Federal Circuit: *Crumbaker v. Merit Systems Protection Board,* 781 F.2d 191 (Fed. Cir. 1986) (failure to enhance "lodestar" for risk and delay held to be an abuse of discretion).

First Circuit: *Wildman v. Lerner Stores Corp.,* 771 F.2d 605, 613 (1st Cir. 1985) ("[A]djustment of the lodestar figure, after examining the particular risks assumed by an attorney in a particular case, may be necessary in order to provide the 'reasonable attorney fee' envisioned by Congress under § 1988").

Second Circuit: *Lewis v. Coughlin,* No. 85-2195 (2d Cir. Sept. 10, 1986) (risk enhancement available in appropriate case); *New York State Association for Retarded Children, Inc. v. Carey,* 711 F.2d 1136 (2nd Cir. 1983) (approving 10% enhancement for risk and quality).

Third Circuit: *Durett v. Cohen,* 790 F.2d 360 (3d Cir. 1986) (risk enhancement available in appropriate case).

Fourth Circuit: *Vaughns v. Board of Education,* 770 F.2d 1244 (4th Cir. 1985) (approving 7½% risk enhancement).

Fifth Circuit: *Wheeler v. Mental Health & Mental Retardation Authority,* 752 F.2d 1063 (5th Cir.) (risk enhancement available in appropriate case), *cert. denied,* 106 S. Ct. 78 (1985). *See also Graves v. Barnes,* 700 F.2d 220 (5th Cir. 1983) (approving 100% risk enhancement).

Sixth Circuit: *Kelley v. Metropolitan County Board of Education,* 773 F.2d 677 (6th Cir.) (en banc) (approving 25% risk enhancement), *cert. denied,* 106 S. Ct. 853 (1986). *See also Louisville Black Police Officers' Organization v. City of Louisville,* 700 F.2d 268 (6th Cir. 1983) (approving 33.33% risk enhancement); *Northcross v. Board of Education,* 611 F.2d 624 (6th Cir.) (approving 10% risk enhancement), *cert. denied,* 447 U.S. 911 (1979).

Seventh Circuit: *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646, 660 (7th Cir. 1985) ("[T]he upward adjustment or multiplier compensates the lawyers for the risk of never being paid and the time-value of money"). ***But see*** *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392-93 (7th Cir. 1984) (questioning appropriateness of risk enhancement).

Eighth Circuit: *Moore v. City of Des Moines*, 766 F.2d 343 (8th Cir. 1985) (risk enhancement available in appropriate case), *cert. denied*, 106 S. Ct. 805 (1986); *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985) (approving 30% enhancement for risk, public importance and success). ***But see*** *Ridenour v. Montgomery Ward & Co.*, 786 F.2d 867 (8th Cir. 1986) (per curiam) (risk usually included in "lodestar").

Ninth Circuit: *Planned Parenthood v. State of Arizona*, 789 F.2d 1348 (9th Cir. 1986) (risk enhancement available in appropriate case); *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (approving 20% risk enhancement), *modified*, 796 F.2d 309 (9th Cir. 1986) (remanding enhancement issue for reconsideration in light of *Delaware Valley*).

Tenth Circuit: *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (risk enhancement available in appropriate case).

Eleventh Circuit: *Jones v. Central Soya Co.*, 748 F.2d 586 (11th Cir. 1984) (risk enhancement available in appropriate case).

D.C. Circuit: *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 28-29 (D.C. Cir. 1984) (questioning propriety of risk enhancement), *cert. denied*, 105 S. Ct. 3488 (1985); *Murray v. Weinberger*, 741 F.2d 1423, 1428 (D.C. Cir. 1984) (risk enhancement permissible only in an exceptional case).

AMICUS CURIAE

BRIEF

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMMONWEALTH OF PENNSYLVANIA, *et al.*
Petitioners

v.

DELAWARE VALLEY CITIZENS'
COUNCIL FOR CLEAN AIR
Respondent

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF JOSEPH A. BONJORNO, GEORGE M. KERR, BARBARA K. CLISBY; AND DUANE, MORRIS & HECKSCHER, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DUANE, MORRIS & HECKSCHER
By: HENRY T. REATH
MICHAEL M. BAYLSON
Attorneys for Joseph A. Bonjorno
George M. Kerr and
Barbara K. Clisby

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF JOSEPH A. BONJORNO, GEORGE M. KERR, BARBARA K. CLISBY; AND DUANE, MORRIS & HECKSCHER, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Pursuant to Rule 36 of the Rules of this Court, Joseph A. Bonjorno, George M. Kerr and Barbara K. Clisby, ("plaintiffs") and their attorneys, Duane, Morris & Heckscher ("counsel"),—as successful plaintiffs and attorneys in an unrelated antitrust case where they have similar issues pending below regarding the award of counsel fees,—respectfully submit this Brief in support of Respondent Delaware Valley Citizens' Council for Clean Air. All other parties to this appeal have consented in writing to the filing of this Brief. The consent correspondence has been filed with the Clerk of this Court.

INTRODUCTION-INTERESTS OF AMICI CURIAE

In 1975, approximately thirteen years after plaintiffs had started a small family owned aluminum culvert pipe fabricating business, (Columbia Metal Culvert Co.) in Vineland, New Jersey, their once profitable business was destroyed. Plaintiffs were forced to cease operations due to the willful, anti-competitive and predatory actions by the defendants Kaiser Aluminum & Chemical Corp. and one of its subsidiaries ("Kaiser").

In January 1974, plaintiffs, having retained counsel on a modified contingent fee basis, (subsequently converted to a full contingency in 1977), filed suit against Kaiser under the antitrust laws in the United States District Court for the Eastern District of Pennsylvania.

After twelve years of complex, hard fought litigation, including three trials, three appeals, and two denials of review by this Court, the case finally ended in 1986. *See Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978), *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *cert. denied,* 106 S. Ct. 3284 (1986).

Kaiser has paid the judgment, but is contesting the amount of interest, counsel fees and expenses.

Except for modest payments totaling approximately $25,000 in the early years of the litigation, counsel did not receive any compensation until July 1986. During its 12 year committment to plaintiffs' case, counsel devoted some 6,328 hours, with a time value (i.e., a "lodestar" value calculated by multiplying the number of hours worked times the hourly rate) of $616,228. Had these fees been billed currently as incurred, counsel's economic expert, in an Affidavit to be filed shortly with the District Court, estimates they would now have a value of $1,146,702.[1]

[1] This figure represents the current value of the cash counsel would have received if it had obtained prompt payment upon monthly billing for its services at their historical rates and invested the money at the average monthly prime interest rate. This figure actually underestimates, to a small

(footnote continues)

Plaintiffs and their counsel's Petition for Allowance of Attorney's Fees and Costs is now pending in the United States District Court for the Eastern District of Pennsylvania. They seek a significant enhancement of the value of counsel's services because of, inter alia, the exceptionally good result achieved, plus additional enhancement for the risk of loss underwritten by the law firm during this period, and the significant delay in payment of fees for over twelve years.

Plaintiffs and their counsel have significant separate interests in the outcome of the instant case before this Honorable Court. They wish to bring to the Court's attention, the special facts concerning their litigation against Kaiser, as additional support for holding that District Courts have significant discretion to enhance the time value ("lodestar") where appropriate, as in a case such as this, because of *risk of loss* and *delay in payment.*

Under plaintiffs' contingent fee agreement with counsel, the attorney's fees awarded against Kaiser will first reimburse the plaintiffs for what they have already paid counsel. Any excess will, pursuant to the fee agreement, be paid to counsel. Thus, both the plaintiffs and their counsel have separate and individual interests in the outcome of this case.

The interests of Amici, in prosecuting their own attorney's fees petition against Kaiser, are similar to, but in some important respects different from, Respondent in the case before this Court, since Respondent is a "pro bono" citizens group which sought only regulatory and injunctive relief, and neither sought nor received damages.

Attorney's fees awarded in antitrust, security fraud and other commercial cases, where the plaintiff has a pecuniary interest in the outcome and must pay a portion of the judgment to counsel as a contingent fee, are, we submit, deserving of

(footnote continued)

extent, the current value because it is based on a computation using a 1979 billing date for the $104,589 in services rendered between 1974 and 1979.

If counsel had received its contingent fee in August of 1979, when the plaintiffs first obtained a favorable judgment, the current value of that fee invested since 1979 at the average monthly prime interest rate would be $2,490,128.

special consideration in this court's adoption of any broad rules on the enhancement of the "lodestar." This is particularly so in cases where Congress has enacted a fee-shifting provision to encourage, in so far as that is possible, that competent counsel can be retained at little or no initial expense. But to accomplish this objective, there must be significant incentive to encourage members of the Bar to take such a case, particularly where the law firm may not be paid, as in plaintiffs' case, for a period of twelve years, and then only if their client ultimately prevails.

Amici urge this Court to interpret Congressional fee shifting statutes to allow an award of attorney's fees against the losing defendant, not only on the basis of the hours worked, multiplied by the reasonable rates, but with due consideration given to the risk of loss and to delay in payment.

ARGUMENT

A. The Risk of Loss and Delay in Payment of Counsel Fees Should Be Considered in Awarding Counsel Fees to the Prevailing Party

(1) Compelling public policy considerations support the proposition that prevailing plaintiffs and their counsel should be rewarded for achieving successful results in antitrust and other federal remedial causes of action, particularly where there is a significant risk of loss and delay in payment. Otherwise, a client with a meritorious but complex case against a large and powerful defendant will have great difficulty, or find it all but impossible, to secure competent counsel.

(2) The importance and value of the "private attorney general" concept of pursuing violations of federal law is well established,[2] but will be substantially diminished unless full and adequate compensation is awarded to the prevailing party and its counsel at the end of a successful case.

(3) Most plaintiffs' antitrust, securities (and similar) cases are handled by counsel on a contingent fee basis that have ranges as high as one-third of the total recovery. Therefore, in order not to dilute the damage award to the plaintiff, it is

[2] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968); *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975).

essential that the final legal fees to be assessed against the defendant take this into consideration. Furthermore, where there is a significant risk of loss and the recognition that some cases will be lost or settled without substantial recovery, an award of attorney's fees, which of course only happens if the plaintiff is successful, should particularly reflect the contingent aspect of counsel's undertaking.[3]

(4) Although young and inexperienced lawyers without substantial overhead might be willing to take on difficult litigation at no more than hourly rates for the opportunity to break into the field or enhance their reputation and build a client base, many cases (including plaintiffs' case discussed in this Amicus Brief) require skilled litigators, backed up by a law firm with the resources and staff needed for complex cases. In plaintiffs' case, counsel not only provided the time of highly skilled litigators who sacrificed the opportunity to bill their time directly for the mere possibility of a significant fee recovery far in the future, but they also advanced the cost of the litigation which totaled over $160,000 with no guaranty of any recovery on that investment. The economics of law practice require that if such firms are to take on such cases, they must be paid more than lodestar compensation when they are successful.[4]

[3] Attorney fee awards by courts in antitrust cases are often set at one-third (or more) of the total recovery. See cases collected in Berger, *Court Awarded Attorneys' Fees; What is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 288 n.34 (1977).

[4] "Vindication of the policy of the law depends to a significant degree on the willingness of highly skilled attorneys . . . to accept . . . cases on a wholly contingent basis." *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1534 (11th Cir. 1983). *See also Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 263 (1975); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265-66 (1972).

In complex litigation involving recoveries of several million dollars the lodestar multipliers tend to be higher than in noncomplex cases. *See Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613 (1st Cir. 1985) (noting that "multiples of 2, 3, 4 and 4.5 have occasionally been given" and that "these multipliers occur primarily in protracted multidistrict antitrust and securities cases involving recoveries of ten million dollars or more").

As Judge (then Professor) Posner commented in *Economic Analysis of Law* at 448-9 (2d ed. 1977):

> "The cost of legal services is occasionally an obstacle to vindication of a claim even when the plaintiff's stakes are very large . . . . The solution that the legal profession has devised is the contingent fee contract. The

(footnote continues)

(5) The delay in payment is an additional fact that district courts should have discretion to consider in making awards.[5] In plaintiffs' case, counsel labored for over twelve years before receiving anything other than a nominal retainer.

(6) That the losing defendant may be obligated to pay a substantial attorney's fee is an additional burden which Congress has rightly decided should be borne by the proven violator. In sum, to carry out this Congressional policy, District Courts should have wide discretion to award counsel fees:

¶. that do not dilute the damages to the winning plaintiff;

¶. that recognize the public policy factors inherent in encouraging competent attorneys to take on complex and risky cases;

¶. that give due recognition to the law firm where it has achieved an outstanding result, underwritten the risk of loss, and has had to wait an exceptionally long

(footnote continued)

> lawyer lends his services against a share of the claim .... It has been argued that contingent fees are often exorbitant: but it is easy to be misled here. A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is so much higher than that of conventional loans."

[5] Many lower courts have embraced the concept that statutory fee awards should be adjusted to reflect the delay in obtaining payment. *See Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 776 F.2d 646, 662-64 (7th Cir. 1985) (discussing cases employing such an adjustment). The principal methods for adjustments that have been recommended are as follows: "the court either may use a multiplier or make an award to the attorney under the current scheduled hourly rate rather than the one in force when the work actually was done. An award of interest at any appropriate rate also could be employed to compensate for delay in payment." Report of the Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 265 (1985). See also *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 196 (Fed. Cir. 1986); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc); *accord: Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976) (en banc) (Lindy II), *Hasbrouck v. Texaco*, 631 F.Supp. 258 (E.D. Wash. 1986).

period before receiving payment of fees incurred or reimbursement of significant costs advanced.

B. The History of Plaintiffs' Case Shows the Need for Enhancement of Attorneys' Fees Based on the Risk of Loss and Delay in Payment

Finally, the history of plaintiffs' case demonstrates the need for enhancement of the lodestar. The plaintiffs' complex antitrust litigation, in which the patience and endurance of plaintiffs and their counsel were tested almost to the breaking point for a period of over twelve years, was vigorously and aggressively defended by Kaiser at every turn. Without substantial enhancement of the "lodestar," both plaintiffs and their counsel will be unfairly penalized and Kaiser, which was found liable for violating the antitrust laws, will be the beneficiary.

(1) Prior to filing suit, plaintiffs sought the assistance of the Antitrust Division of the United States Department of Justice. Although sympathetic to plaintiffs, the Antitrust Division cited a lack of resources to prosecute plaintiffs' allegations against Kaiser and advised plaintiffs to retain counsel acting as a "private attorney general."

(2) In January, 1974, after an in depth investigation by counsel, plaintiffs filed an antitrust Complaint in the United States District Court for the Eastern District of Pennsylvania against Kaiser, alleging violations of Sections 1 and 2 of the Sherman Act, and other claims. At the first trial in 1977, a directed verdict was entered in favor of Kaiser.

(3) Thereafter, counsel, mindful of plaintiffs' impecunious situation, and their inability to finance an appeal, agreed to underwrite the full cost of the appeal without any advance compensation, solely on the prospect of securing a reversal and a favorable damage judgment at a second trial.

(4) On appeal, the Third Circuit reversed the directed verdict in favor of Kaiser and remanded the case for a new trial. *Columbia Metal Culvert Co. v. Kaiser Aluminum and*

Chemical Corporation, 579 F.2d 20 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978). This Third Circuit opinion is an important precedent on the definition of a relevant product market in antitrust cases.

(5) At the second trial, in August of 1979, a jury found against Kaiser on all issues, and awarded damages of $5.5 million, trebled.[6]

(6) In June of 1981, the district court entered an order granting Kaiser a new trial as to damages only.

(7) The third jury trial, limited only to damages, took place in November, 1981, following which a new judgment was entered against Kaiser for $9.5 million, trebled. The District Court, in January, 1983, granted Kaiser's motion for Judgment NOV, in part, reducing the amount of the verdict in favor of plaintiffs to $4.6 million, trebled.

(8) Upon appeal by both Kaiser and plaintiffs to the Court of Appeals for the Third Circuit, that court delayed a ruling pending this court's opinion in *Copperweld Corp. v. Independence Tube Co.,* 467 U.S. 752 (1984), following which it invited additional briefs, and issued its opinion on December 27, 1984, reversing the District Court's grant of partial judgment NOV in favor of Kaiser, and reinstating the full jury verdict entered in December, 1981. *Bonjorno v. Kaiser Aluminum and Chemical Corporation,* 752 F.2d 802.

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[6] Plaintiffs' evidence on the issues of liability showed that:

(1) Kaiser threatened to put a new culvert fabricating plant "across the street" from plaintiffs plant if they purchased raw material from a third party instead of Kaiser.

(2) After plaintiffs decided to purchase from a third party, Kaiser did put a plant only 40 miles away from plaintiffs' plant in Vineland, New Jersey.

(3) Kaiser pirated away plaintiffs' best salesman, and set him up as a Kaiser distributor in plaintiffs' principal selling territory.

(4) Kaiser started a price squeeze which reduced the margin between the raw material and finished culvert pipe, so that an independent fabricator could not compete. Plaintiffs' evidence showed that Kaiser destroyed plaintiffs' business and closed down the company in 1978.

(9) Thereafter Kaiser filed its Petition for Certiorari in this Court. On October 7, 1985 this Court invited the Solicitor General to file a brief. Almost 8 months later, the Solicitor General filed a brief recommending that this Court deny Kaiser's Petition for Certiorari.

(10) This Court's Order denying Kaiser's Petition for Certiorari was entered on June 23, 1986, thus ending this litigation after 12 years, 5 months and 6 days.

(11) Kaiser paid the treble damage judgment on July 1, 1986.

CONCLUSION

We respectfully submit that the above brief description of the history of plaintiffs' case demonstrates the wisdom and fairness of giving District Courts broad discretion to enhance the time value of legal services by considering risk of loss and delay in payment.

Plaintiffs' antitrust litigation totally validates the rationale and public policy considerations supporting a contingent fee arrangement in these kind of cases.

This was not an easy case to win. But, as one jury concluded on liability, and two juries concluded on damages, plaintiffs did have a highly meritorious case.

Without the assistance and persistance of qualified counsel, who were willing to risk their time and invest their energies, their enthusiasm, and their own funds in dedication to the clients' cause, justice would never have been done.

Therefore, *amici* respectfully submit that the decision of the court of appeals should be affirmed, and that the opinion of this Court should reaffirm the principle that District Courts have discretion to enhance the time value of legal services by considering risk of loss and delay of payment.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER
Henry T. Reath
Michael M. Baylson

1500 One Franklin Plaza
Philadelphia, PA 19102

AMICUS CURIAE

BRIEF

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OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Petitioners,

—v.—

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF TWELVE SMALL PRIVATE CIVIL RIGHTS LAW FIRMS, IN SUPPORT OF RESPONDENTS*

JOHN LEUBSDORF
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5273

Counsel of Record

* The inside front cover provides a complete list of *amici*.

BENSON & MCKAY
1430 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 842-7603

BLACKSHER, MENEFEE & STEIN, P.A.
405 Van Antwerp Building
P.O. Box 1051
Mobile, Alabama 36633
(205) 433-2000

FALKENBERRY, WHATLEY & HEIDT
Fifth Floor Title Building
300 Twenty-First Street North
Birmingham, Alabama 35203
(205) 322-1100

FARNSWORTH, SAPERSTEIN & SELIGMAN, P.C.
505 Fourteen Street, Suite 1150
Oakland, California 94612
(415) 763-9800

FERGUSON, STEIN, WATT, WALLAS & ADKINS, P.A.
Suite 730
East Independence Plaza
951 South Independence Blvd
Charlotte, North Carolina 28202
(704) 375-8461

GORDON, SILBERMAN, WIGGINS & CHILDS, P.C.
Fifteenth Floor
Colonial Bank Building
Birmingham, Alabama 35203
(205) 328-0640

GRONEMEIER, BARKER & HUERTA
199 South Los Robles Avenue
Suite 810
Pasadena, California 91101
(818) 796-4086

JULIAN & DANIEL, P.C.
3301 Elm Street
Dallas, Texas 75226
(214) 939-9230

OAKLEY & BONNER
Suite 508 Carnegie Building
133 Carnegie Way
Atlanta, Georgia 30303
(404) 223-5250

RONEY & LABINGER
344 Wickenden Street
Providence, Rhode Island 02903
(401) 421-9794

SPRIGGS & WARREN, P.A.
117 S. Martin Luther King Jr. Blvd.
Tallahassee, Florida 32301
(904) 224-8700

STERN & SHAPIRO
80 Boylston Street, Suite 910
Boston, Massachusetts 02116
(617) 542-0663

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QUESTION PRESENTED

May an attorney's fee award under Section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d) (1982), based on the number of hours worked and the prevailing noncontingent hourly rate, be enhanced to reflect the risk that plaintiffs might not have prevailed and, therefore, might have obtained from defendants no attorney's fees at all?

SUMMARY OF ARGUMENT

The amici submitting this brief are 12 small private law firms struggling to survive under current attorney's fees award standards by accepting low lawyer incomes, borrowing from banks, and taking some non-civil rights cases from paying clients (see Interest of Amici Curiae). For them, as for other lawyers, it is an economic fact that an attorney who bears the risk of not being paid unless and until his client prevails experiences a heavy, extra cost (Part I A). Courts and bar associations have traditionally upheld compensation for that cost when lawyers seek fees from their clients or recover fees from opposing parties (Part I A). Statutory provisions for "reasonable attorney's fees" incorporate such compensation, and without it cannot achieve their goal of enabling clients to find the competent lawyers needed to enforce

environmental and civil rights legislation (Part I B). Petitioner's challenges to compensation for bearing the risk of loss are baseless (Part I C); there are several workable methods to award such compensation without fear of overpayment (Part I D). This case is particularly appropriate for such an award: petitioner itself increased respondent's risk of loss by fighting enforcement "tooth and nail" (762 F.2d 272, 281 (3d. Cir. 1985)), throwing the vast resources of a state into the frustration and violation of a federal court order (Part II).

INTEREST OF AMICI CURIAE*

INTRODUCTION

The twelve law firms submitting this amicus curiae brief are small private firms that represent plaintiffs in civil rights litigation. All of these firms depend on court-awarded attorney's fees in order to survive as civil rights-oriented firms. Although the firms vary in size, in the percentage of their practice devoted to civil rights litigation, and in the types of cases that they have found to be feasible to undertake, they all have in common a financial precariousness largely attributable to the contingent nature of their practice and the long delays in payment.

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* The parties have consented to the filing of this brief, and their letters of consent will be filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

Failure to incorporate costs of risk and delay into the fee award will seriously undermine the economic viability of these and other small firms that make up the experienced plaintiff-side civil rights bar, and will inevitably lead to the withdrawal of many of the most experienced and talented attorneys from this practice.1/

1/ Published sources agree that law firms such as amici are rarely as financially secure, and that the attorneys are rarely as well off, as their counterparts in traditional private practice. See Hearings on S.585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 46,53,54 (1982) (statement of Fletcher Farrington); Hearings on S.2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess 379-81, 388 (1984) (Statement of Charles V. McTeer); J. Handler, E. Hollingsworth, & H. Erlanger, Lawyers and the Pursuit of Legal Rights 116 (1978) (attorneys in firms engaged in mixed practice of commercial and public interest law earned only 54% as much as age-matched counterparts in regular private practice).

Blacksher, Menefee & Stein, P.A.
Mobile and Birmingham, Alabama

This seven-year old firm consists of three lawyers who devote almost all of their time to civil rights litigation, especially Title VII, Section 1983, and voting rights cases, with an increasing emphasis on the last. Compensation in these cases is contingent on success. The firm no longer handles individual Title VII claims, because in its experience an adequate fee award is rarely, if ever, obtained in such a case.

The firm survives by keeping expenses and overhead to a minimum. For example, it has no library. One of the partners, who has been a lawyer for 15 years, has an annual salary of $18,000, although in some years additional bonuses have been available from fee awards. The experience and salaries of the other two partners are comparable. The firm has been significantly in debt at least twice in order to finance its continued

operation.

In several of its cases the firm invested thousands of hours of its time before receiving payment. In City of Mobile v. Bolden, 446 U.S. 55 (1980), for example, the firm invested 5,000 hours over ten years before finally receiving attorney's fees. Because of recent significant recoveries in two major voting rights cases, Bolden and Escambia County v. McMillan, 466 U.S. 48 (1984) the firm has been somewhat more financially stable than in the past. In those two cases the firm received enhancements of its hourly rate of 2 and of 1.85, respectively, to reflect the risk of loss and delay in payment, which, to the firm's knowledge, is the uppermost limit awarded in voting rights cases.

Farnsworth, Saperstein and Seligman, P.C.
Oakland, California

This fourteen-year old, nine-lawyer firm specializes in plaintiffs' employment discrimination litigation, both individual and class actions. Compensation in all class action litigation and most individual litigation is contingent on success because plaintiffs usually lack the resources to pay the firm during the litigation.

Since the firm does not receive regular payments from its clients, it is often in debt and has run monthly deficits up to $100,000. In August, 1986, this outwardly successful firm exhausted a $600,000 line of credit. Only the settlement of a large Title VII class action at the end of August saved the firm from insolvency. Costs alone in that case were almost $160,000 and 6,600 hours were invested, with no compensation for four years. In another case the firm invested 8,000 hours over nine years, and in

a currently active ten-year old case the firm has already expended 11,000 hours and incurred $160,000 in costs.

One reason for the enormous expenditures of time and money is the vigorous resistance of defense counsel. A common strategy of defendants is to wage a war of attrition so that the plaintiffs will settle without regard to the underlying merits of the action. The risk of failure in civil rights cases is compounded by the relative youth of, and consequent uncertainties, in this area of the law. After General Telephone Co. v. Falcon, 457 U.S. 147 (1982), for example, class decertification motions were filed in all of the firm's Title VII class actions.

The firm can not afford to, and will not in the future engage in, Title VII litigation if fee awards do not compensate the firm above normal noncontingent hourly rates. The firm is aware of at least 25 experienced

plaintiffs' Title VII attorneys from the Bay Area who have left this practice, even though they were very successful in winning cases, because of cash flow problems caused by delays and because they were not receiving fees in excess of their noncontingent rates.

In the course of attorney's fees litigation the firm has gathered evidence on how the prevailing legal market in Northern California values risk in determining whether to accept a contingent fee case. All attorneys deposed have testified that they expect an upward adjustment of their normal noncontingent hourly rate. For example, Jerome B. Falk, Jr., past President of the Bar Association of San Francisco and a partner in a major San Francisco corporate law firm, has testified that because of the substantial risk and the delay in payment, "a rule of thumb which we follow is that the anticipated fee, if successful, should be at

least twice the value of the projected time to be expended at our regular hourly rates." Declaration in Support of Plaintiffs' Application for Interim Award of Attorney's Fees, Plaintiffs' Exhibit 5 at 4:10-5:1, Kraszewski v. State Farm General Insurance Co., Docket No. C79-1261 TEH (N.D. Cal. Dec. 15, 1985).

Spriggs & Warren, P.A.
Tallahassee, FL

This three-lawyer, fifteen-year old firm specializes in employment discrimination law, mostly large class actions brought pursuant to Title VII. No client has ever paid more than $2,000 - $3,000 during the course of litigation. With all fees at risk, the firm has often been substantially in debt, at times over $100,000. In one case, after prevailing at the liability stage and receiving an interim fee award, the court required the firm to give to the defendant a

mortage on its building as collateral in order to receive the interim fee.

Employers tend to defend class action employment discrimination cases tenaciously. Opposing counsel is often from high quality, large corporate firms expert in this field who employ sophisticated and expensive expert analyses of work forces and work histories of employees. Such defense tactics not only drive up the number of hours expended and costs incurred, but also increase the risk that plaintiffs will not prevail and thus that the hours and expenses will not be recouped.

In one pending employment case, the firm has expended thousands of hours over ten years without any payment. In a voting rights case, NAACP v. Gadsden County School Board, 691 F.2d 978 (11th Cir. 1982), fees were recovered only after more than ten years of litigation. Few attorneys in this area

will take these cases because of the uncertainty and inadequacy of payment. The firm has not found plaintiffs' civil rights litigation to be financially rewarding.

Ferguson, Stein, Watt, Wallas & Adkins, P.A.
Charlotte and Chapel Hill, North Carolina

This 18-year old firm consists of twelve lawyers, ten of whom are partners. The firm engages in a general law practice, but devotes over half of its time to civil rights cases, especially employment and housing discrimination, voting rights, and police misconduct litigation.

The firm's income is very dependent on prevailing in civil rights cases. Frequently over the past fifteen years income has barely met expenses, excluding lawyers' salaries. In 1984, for example, attorneys' salaries fell months behind and final salaries were only 75% of those projected. In 1985 salaries fell four months behind until a

major fee was recovered in a tort case.

The firm has experienced a variety of problems with respect to finances in contingent civil rights cases. First, because plaintiffs cannot afford to pay either expenses or the attorney's fees as they are incurred, the firm must finance the case. Second, defendants often employ highly skilled defense counsel and are able to afford litigation strategies that increase both the cost to the firm and the risk of not prevailing.

Third, even after a careful review of a case at the outset, the firm's risk assessment is incomplete. Unanticipated changes in these relatively new areas of law, such as International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), unexpected defenses, or facts developed in discovery significantly alter the risk of loss long after substantial time

and money has been invested.

Finally, important class actions take many years to litigate. For example, the firm invested 3,500 hours and $57,000 in costs and expenses before recovering fees in Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981). In Jones v. Board of Governors of the University of North Carolina, 704 F.2d 713 (4th Cir. 1983), defendants litigated the attorney's fees issue until May, 1986, three years after the merits were decided.

For several reasons, very few lawyers in North Carolina are willing to handle civil rights cases. Expertise is required to litigate effectively in this increasingly complex field. In addition, most lawyers are unable or unwilling to bankroll a case when the amount of time expended and length of delay before a possible payment is so great. Finally, traditional contingent

cases, such as in the tort field, are more predictable than civil rights litigation.

Julian & Daniel, P.C.
Dallas, Texas

This two-lawyer firm started in 1981 and focuses on housing discrimination and voting rights, increasingly specializing in the former. The firm relies almost exclusively on court awarded attorney's fees and rarely receives payment from its mostly indigent clients. Therefore, the firm must stay extremely flexible as to overhead and keep monthly expenses to a minimum. The firm rents space from a larger law firm.

The firm has experienced extended periods of time without any regular income and there have been months when funds have been insufficient to pay the attorneys' salaries. Although local legal services programs formerly helped fund aspects of some

of the firm's larger cases, this now rarely occurs.

Among the problems the firm has faced with this type of litigation is the inordinate delay, often six months to two years, between resolution of the merits and payment of the fee, thus further burdening an already precarious financial situation. The affidavits this firm submits to the courts with its fee applications make clear that the prevailing area hourly rate is that charged by attorneys for noncontingent work and does not include compensation for either the service of bearing the risk of nonpayment or the delay in receipt of payment that would be necessary to induce an experienced and competent lawyer to undertake civil rights litigation. This firm has also found that the federal government, unlike a private defendant, lacks any financial incentive to resolve the fee award issue expeditiously and

it often resorts to a war of attrition to avoid paying a reasonable fee.

Oakley & Bonner
Atlanta, Georgia

The two attorneys in this three-year old firm engage in civil rights litigation, primarily in the area of employment discrimination. Virtually all of the firm's income is in delayed fees payment, since the clients can afford to pay very little, if at all. Because fee payments are delayed and are often below market hourly rates, the firm's monthly income is erratic and unpredictable. Partners' income is also irregular and would often be insufficient to live on without the regular income earned by their spouses.

The firm has found that in litigation against public employers the economic considerations that motivate private employers often do not apply, which results

in exceptionally time-consuming, and hence expensive, lawsuits. The risk of nonpayment is further increased by negotiating strategies that offer significant relief to the client in exchange for a full or partial waiver of fees, an event that will become increasingly common in light of Evans v. Jeff D., 106 S. Ct. 1531 (1986).

Gordon, Silberman, Wiggins & Childs, P.C.
Birmingham, Alabama

Most of the lawyers in this 17-attorney firm are involved in commercial and corporate activities. Four of the attorneys primarily practice plaintiff-side labor and employment discrimination law. A substantial portion of the firm's income and expenses is related to civil rights litigation, primarily race and sex discrimination in employment, in which payment is contingent on success. The firm turns away noncontingent work in order to engage in civil rights litigation because of

a commitment to such work and because there are few experienced attorneys in Alabama who represent such plaintiffs.

Involvement in civil rights cases on a contingent basis has had a significantly negative impact on the firm's financial situation. First, there is the delay of payment, normally three to four years, but in some cases as long as ten years. The lack of cash flow results in heavy reliance on bank loans to level the peaks and valleys caused by the firm's civil rights litigation. For example, the firm currently attributes $200,000 of debt to these cash flow problems. Second, the firm incurs substantial out-of-pocket expenses, often amounting to tens of thousands of dollars, normally paid by the client in noncontingent representation, but which its employment discrimination clients simply cannot afford to pay.

Third, and most important, is the obvious risk of loss of all fees and expense reimbursement in the event that the lawsuit is unsuccessful. The loss of payment for several thousand hours of work can be severely disabling to a firm already weakened by the lengthy delay in payment of fees and expenses in successful cases. Because the market sets the firm's noncontingent rates, they cannot be adjusted upward to reflect the contingent nature of the firm's civil rights representation if the firm is to remain competitive with area law firms in noncontingent work. Any claim that the market's noncontingent rates already adequately reflect risk of loss simply ignores the reality that such risk in civil rights cases is significantly greater than the risk of nonpayment by insolvent, regularly-billed noncontingent clients. It is essential to the firm's economic

stability, and thus its ability to undertake employment discrimination litigation, that fee awards reflect the service the firm provides the client by assuming the risk of loss and delay in payment.

Benson & McKay
Kansas City, Missouri

This four-lawyer firm is based on a loose association between the two partners. John McKay engages primarily in a tort practice. Arthur Benson practices in the civil rights area; since 1979, he has been co-lead counsel in the Kansas City, Missouri school desegregation litigation, Jenkins v. State of Missouri, 593 F.Supp. 1485 (W.D. Mo. 1984).

Almost all civil rights litigation is taken on a contingent basis. Because very few clients are on a retainer, there is no assurance of income from month to month. Following an initial risk assessment based on

incomplete information, the firm invests substantial time and money in a case. Even after cases are won, defendants are almost uniformly recalcitrant in paying fees. As a result of these and other factors, the final award never fully compensates the firm, even where the results are excellent.

Benson has borrowed over $500,000 to finance his participation as co-lead counsel in the Kansas City school desegregation case. Seven years after his involvement in this case, he has recovered $300,000 in undisputed fees. An award of the remainder currently awaits the outcome of an appeal of part of the lawsuit to the Eighth Circuit. Only if the court awards compensation for risk will Benson recover fees in excess of his debts after more than eight years of successful effort. He continues to commit hundreds of hours to enforcement and implementation of the court's decree, subject

to delayed and uncertain compensation.

Falkenberry, Whatley & Heidt
Birmingham, Alabama

This five-lawyer firm devotes about half of its time to civil rights cases, primarily Title VII, age discrimination, and Section 1983. The lengthy delays in collecting fees exacerbate the cash flow problems inherent in this type of practice. Often the firm litigates a case for as long as four years, investing substantial time and money, before it receives any fees. In some months fees collected barely cover overhead.

Gronemeier, Barker & Huerta
Pasadena, California

This four-year old, ten-lawyer civil litigation firm devotes substantial time to contingency fee civil rights litigation. The cash flow problems that such cases cause have led the firm to reduce its public interest

litigation from about one-half to one-third of the firm's work load. The firm has determined that, to be profitable, a successful contingent case must generate a fee that is two to three times greater than the firm's noncontingent hourly rate to account for risk and delay in payment. Because it has never received a fee enhancement greater than 1.5, civil rights litigation is not as financially rewarding as noncontingent litigation available to the firm.

In addition, the firm has found that public officials tend to vigorously oppose attorney's fees in public interest litigation as compared to more traditional cases such as eminent domain proceedings. This may be attributable to the strong personal and political interest that public officials have in such cases. Whatever the reason, the

result is to make such work riskier and more costly to the firm.

Roney & Labinger
Providence, Rhode Island

The two lawyers in this three-year old firm devote about half their practice to civil rights and employment discrimination litigation. The typical discrimination case requires between 100 and 200 hours. Class actions that depend on the development of individual case histories are too risky and expensive for this small firm to litigate on a contingent basis.

The uncertainties of fee awards and the likelihood of compensation at reduced rates has led the firm to require clients to pay a retainer fee of $1500-$2500 in contingent cases. The firm departs from this practice only for cases taken as cooperating counsel for the Rhode Island Civil Liberties Union or where the client has a particularly strong

case but is financially unable to pay any fee.

One particular problem the firm has faced with fee awards is that district courts sometimes make wholesale reductions in the number of hours invested. Even in the rare instance of an enhancement for risk such reductions have resulted in a less than compensatory fee. After a case is settled defendants usually offer a fee substantially below plaintiffs' counsel's proposed lodestar, thereby encouraging further litigation. The firm's experience is that employment discrimination cases are simply not financially competitive with other types of litigation.

Stern & Shapiro
Boston, Massachusetts

This four-attorney, thirteen year-old firm devotes about one-third of its time to civil rights litigation, including employment

and housing discrimination, police misconduct, and prisoners' rights. The firm also acts as fee counsel for other attorneys in Section 1988 applications.

In its fee applications after successful civil rights litigation, the firm usually seeks an enhancement for the risk of nonpayment, which it rarely receives. District judges have often awarded hourly rates lower than the firm's noncontingent rates and the number of hours worked is also frequently reduced. Thus, the lodestar rarely matches the firm's noncontingent fees, even disregarding the risk of nonpayment. This reduced lodestar apparently reflects a widespread judicial view that these cases are taken on a pro bono basis and should be compensated accordingly. The firm believes not only that a fully compensatory fee will encourage attorneys to engage in civil rights practice, but that it will also deter defense

tactics designed to wear down civil rights plaintiffs and their attorneys, who generally have limited resources.

ARGUMENT

I. A REASONABLE ATTORNEY'S FEE SHOULD INCLUDE COMPENSATION FOR THE RISK OF LOSS

The "reasonable attorney ... fees" mandated by Section 304 of the Clean Air Act, 42 U.S.C. § 7604(d), and other statutes such as 42 U.S.C. § 1988, would be inadequate did they not compensate lawyers for the risk of not being paid.[2/] Compensation for that risk has traditionally been included in attorney's fees. The risk is a real expense that lawyers bear when they accept cases in which the prevailing plaintiff -- but not the

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[2/] The Court has determined that the attorney's fees provisions of §304 and §1988 should be interpreted in the same manner. See Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 92 L.Ed.2d 439, 453 (1986).

losing one -- recovers a fee; and they are entitled to be paid for bearing it.

The statutory policy of enabling plaintiffs with meritorious civil rights and environmental claims to obtain lawyers as competent as those litigating commercial suits can be attained only if statutory fees take into account the risk of litigating for years without ever receiving compensation. The most equitable and rational way of achieving this goal would be to compute the risk factor identically within a broad class of cases, without investigating the particular contingencies of each case. If that is not done, this Court could adopt one of several alternative ways to compensate for the risk of loss, including the current practice reflected in the lower court opinions in this case. But to deny all compensation for that risk would depart from both the historic meaning and the policy of

statutes that award reasonable attorney's fees.

A. Courts and Lawyers Have Long Included Compensation for The Risk of Loss in Attorney's Fees Awards

A reasonable attorney's fee has consistently, since the turn of the century, included consideration of "the contingency or the certainty of the compensation."[3/] Whether a lawyer sought a jury award of a reasonable fee or was charged in disciplinary proceedings with obtaining an unreasonable one, the contingency factor was as relevant as the number of hours required or the lawyer's credentials. It still is.[4/] A fee

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3/ A.B.A. Canons of Professional Ethics, No. 12 (1908). Accord, e.g., Leitensdorfer v. King, 7 Colo. 436, 442, 4 P. 37, 41 (1884); Succession of Linton, 31 La. Ann. 130, 132 (1879); Smith v. Couch, 117 Mo. App. 267, 272, 92 S.W. 1143, 1145 (1906).

4/ See, e.g., A.B.A. Model Code of Professional Responsibility, DR 2-106(B)(8) (1969); A.B.A. Model Rules of Professional Conduct, Rule 1.5(a)(8) (1983); 1 S. Speiser, Attorneys' Fees 319 (1973) (collecting cases); C. Wolfram, Modern Legal Ethics 520 (1986).

that ignores this factor is no more what Congress designated in fee statutes as a "reasonable attorney's fee" than would be a fee that ignores all time devoted to discovery proceedings.

These holdings reflect an economic fact: the risk of not being paid is a real cost of the lawyer who must bear it.[5/] A lawyer who invests weeks, months or years of his own time -- to say nothing of paying salaries of support staff and rent -- without knowing for several years whether and how much he will be paid incurs a cost that other lawyers do not. Compensation is "reasonable" only if it covers that cost.

The lawyer is often the only person who can bear the risk of loss, since the client cannot afford to do so, and no one else knows enough to appraise that risk: few banks would lend a plaintiff money for a suit with a cause of action as collateral.[6/] A fee that is adequate when a firm charges it to a client able and committed to pay on a regular basis is not adequate for a lawyer who does the same work without knowing whether he will ever be entitled to any payment. Courts should not ignore this fact.

And courts have not ignored it when they have assessed statutory fees: consideration

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5/ Then Professor, now Judge, Easterbrook explained this economic reality in detail in an expert affidavit he submitted in support of a 3.5 contingency multiplier. Affidavit of Frank H. Easterbrook and Robert A. Sherwin, In re Burlington Northern Inc. Employment Practices Litigation, Master File No. MDL 374, No. 78 C 269 (N.D. Ill. Aug. 23, 1984). See also P. Danzon, Medical Malpractice 197 (1985); Shavell, Risk Sharing and Incentive in the Principal and Agent Relationship, 10 Bell J. Econ. 55 (1979); Nagel, Lawyer Decisionmaking and Threshold Analysis, 36 U.Miami L. Rev. 615 (1982);Schwartz & Mitchell, An Economic Analysis of the Contingent Fee in Personal-Injury Litigation, 22 Stan. L. Rev. 1125, 1153 (1970).

6/ As the amici show, see Interest of Amici Curiae, supra, lawyers can sometimes borrow from banks to finance litigation. Such lawyers still bear the risks of litigation: even if they lose the case, they still must repay the bank, with interest.

of the contingency factor is well established in the jurisprudence of attorney's fees statutes. When statutory fees were based on a percentage of the plaintiff's recovery, courts considered the contingency factor in deciding what that percentage should be.[7] When courts began to calculate fees on an hourly basis, the leading cases recognized the contingency factor as a ground for increasing the "lodestar" hourly fee.[8] Other courts followed these precedents.[9] Congress,

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7/ See, e.g., United States v. Equitable Trust Co., 283 U.S. 738, 746 (1931); Angoff v. Goldfine, 270 F.2d 185, 191 (1st Cir. 1959); In re Detroit International Bridge Co., 111 F.2d 235, 237 (6th Cir. 1940); In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931).

8/ See, e.g., Copeland v.Marshall, 641 F.2d 880, 892-93 (D.C. Cir. 1980); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (1973), 540 F.2d 102, 117 (3d Cir. 1976); City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974).

9/ See Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473, 473 n.1 (1981) (citing decisions by seven U.S. Courts of Appeals and by state courts); 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees, ¶16.04 (1985 & 1986 Supp.).

in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 (1982), cited with approval several cases holding the contingency factor relevant to fee awards. S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5913.

B. Congress' Purposes in Enacting Fee Statutes Requires Compensating Lawyers For Bearing The Risk of Loss

The Congressional policies behind fee-shifting statutes such as Sections 304(d) and 1988 as well as the traditional reading of the words "reasonable attorney's fees" compels the conclusion that these statutes require compensation for the risk of loss. Congress wished to provide "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." S. Rep. No. 1011, at 6, 1976 U.S. Code Cong. & Ad. News at 5913; accord,

e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 92 L.Ed.2d 439, 453 (1986); City of Riverside v. Rivera, 91 L.Ed.2d 466, 481 (1986); Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02 (1968). Congress also decided, however, to reach this goal by awarding attorney's fees only to prevailing parties.[10/]

Congress' decision to use attorney's fees to attract competent counsel can succeed only if courts set the fee level to compensate for the risk of nonpayment. Although some lawyers may be altruists willing to sacrifice income to take public interest cases, Congress, in passing fee statutes, clearly did not assume that

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10/ Other approaches were of course possible. See, e.g., 18 U.S.C. § 3006A (Criminal Justice Act defense attorneys receive hourly fee regardless of outcome); Tobias, Of Public Funds and Public Participation, 82 Colum. L. Rev. 906 (1982) (agency programs to fund in advance participants in rulemaking under statutes such as 15 U.S.C. § 57a(h)(1)).

sufficient competent lawyers fell in that category.[11/] For private public interest firms like the amici submitting this brief -- firms that seek to specialize in Title VII or other civil rights cases -- compensation for bearing the risk of nonpayment is essential to survival.[12/]

Contrary to petitioner's suggestion, Supplemental Brief, at 10-13, the ratio of civil rights suits to other civil actions filed in the federal courts has decreased over the past decade; the statistical evidence gives no warrant for cutting back fee awards.[13/] The largest drop in the

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11/ See Darden v. Ill. Bell Tel. Co., 41 FEP Cases 731, 736 (7th Cir. July 30, 1986) (Easterbrook, J., concurring) ("Unless fees under § 1988 are enhanced to take account of the risk of losing ... fees will be systematically too small" to attract sufficient attorneys to Title VII practice).

12/ See Interest of Amici Curiae, supra, and authorities cited in Note 1, supra.

13/ In each year, the statistics are for the year ending June 30. The official figures for civil rights filings as a percentage of total civil cases commenced

(Footnote Cont'd)

percentage of civil rights filings occurred in 1985, after some courts restricted compensation for the risk of loss.[14/] Whatever the explanation for these developments, they show that Congress' goal of encouraging civil rights suits has not been so successful as to necessitate further trimming of awards.

If fee awards exclude compensation for the risk of loss, the lawyers who take

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are as follows:

1976:	9.4%	1979:	8.5%	1982:	8.3%	1985:	7.1%
1977:	10.0%	1980:	7.7%	1983:	8.2%		
1978:	9.2%	1981:	8.5%	1984:	8.1%		

State prisoner suits declined over the same period from 11.5% to 9.9%. Annual Report of the Director of the Administrative Office of the United States Courts: 1976, at 174; 1977, at 188; 1983, at 123; 1984 at 134; 1985, at 139.

14/ See McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984); Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 3488 (1985), both construing Blum v. Stenson, 465 U.S. 886 (1984). The percentages of civil filings that were civil rights suits dropped markedly in the D.C. and Seventh Circuits between the 1984 and 1985 court years. Compare 1984 Annual Report, Table C-3, at 256-63, with 1985 Annual Report, Table C-3, at 284-91.

statutory fee cases will tend increasingly to be inexperienced or less competent ones. As a result, they may overburden courts and opposing parties with needless litigation. Such ineffective representation will also ill-serve the victims of unlawful action that the fee statutes are designed to protect.

C. Objections to Compensation for the Risk of Loss are Unfounded

Compensation for the risk of nonpayment is by no means -- as petitioner has argued -- a way of paying lawyers for their defeats in other cases. The prevailing attorney receives compensation for a service he provides: bearing the risk of losing this case, not another one. Such compensation should be paid regardless of whether he lost or won other statutory fee cases. Indeed, it should be paid even if he has never taken any other such cases. It is payment for risk, such as an engineer might receive for working

in an unhealthy swamp. An employer could not properly say, after the engineer finished the job: "You did not become ill, and therefore are not entitled to extra pay -- you are trying to get paid for what happened to other workers." The engineer took the risk, not knowing if he would be the one to succumb, and he should be paid for bearing that risk. So should the lawyer.

Nor is it correct to argue -- as the Solicitor General has done -- that payment for bearing the risk of loss is some form of double billing. A lawyer may spend more time litigating a case in which the client is less likely to prevail; if so, and if the client does prevail, the "lodestar" fee should include compensaton for those extra hours.[15/]

15/ As several amici point out, see Interest of Amici Curiae, supra, judges, acting with hindsight, tend to undervalue the difficulty of a case after success, and thus to reduce the hours actually worked. See also Leubsdorf, supra note 9, at 485-88.

The lawyer, however, also risks getting paid for none of the hours worked should the client lose. Thus, the lodestar may compensate for one service the attorney provided -- overcoming the difficulty of the case -- but it does not compensate for an additional service -- bearing the risk of nonpayment.

Compensation for risk is also clearly not included in hourly rates based on what law firms charge noncontingent clients, since those firms know that their clients are legally obligated to pay fees regardless of outcome, and (with rare exceptions) are financially able to do so. In other words, the hourly rate compensates only for the small risk of client insolvency. Particularly in a case like this one, in which the district court eliminated more than one-third of the hours claimed, and set low hourly rates for many of the remaining hours,

the lodestar fails to reflect the risk of loss. The district court, in explicitly awarding a contingency enhancement, made clear that the lodestar did not reflect such risk, and hence it compensated for risk only once, and then for only some of the hours counsel reasonably expended.

D. Courts Could Incorporate Compensation for the Risk of Loss into Fee Awards in Several Fair and Practical Ways

The most equitable and rational way to incorporate the risk of loss in attorney's fees calculations -- and the way that eliminates valid objections to past contingency multiplier practice[16/] -- would be to multiply all attorney's fee awards by the same figure.[17/] Doubling all awards, for

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16/ See Leubsdorf, supra note 9, at 482-97.

17/ See id. at 507-12 (proposing doubled awards); Note, Attorney Fees and the Contingency Factor Under 42 U.S.C. § 1988: Blum v. Stenson, 465 U.S. 886 (1984), 64 Or. L. Rev. 571, 589-90 (1986) (proposing

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instance, would make it as profitable for lawyers to accept a statutory fee case with an even chance of success as it is to accept a paying case at their basic hourly rate. Congress' goals would be met by giving lawyers greater incentives to take stronger cases, and by discouraging them from taking cases more likely to fail than succeed. A standard doubling for risk also dispenses with the imaginary horribles of huge multipliers invoked by petitioner.

Such an across the board fee increase would also be fair to losing defendants. Since their fee payments would all be increased in the same proportion, a defendant with a relatively strong case could no longer argue that, theoretically, he could be subject to a larger contingency increase than a defendant with only frivolous defenses.

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multiplier based on updated litigation statistics, initially set between 1.12 and 2.2).

Defendants as well as plaintiffs would know in advance that, should the plaintiff win, the defendant would have to pay twice the lodestar fee, and they would be able to plan their defense and settlements accordingly. The courts, moreover, would be spared the problematic task of deciding after a plaintiff prevailed what the probability of not prevailing had been in that case; they would simply apply the standard multiplier.

Should the Court not approve this approach, there are several other ways in which the risk of loss could be included in attorney's fee calculations. First, courts could grant individualized contingency increases as they do now, but only within numerical limits laid down by this Court. This system has been recently adopted in Florida.[18/] It preserves many of the

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18/ Florida Patient's Comp. Fund v. Rowe, 472 So.2d 1145, 1151 (Fla. 1985) (multipliers must be between 1.5 and 3, depending on judicial evaluation of (Footnote Cont'd)

advantages of an across the board multiplier, while allowing some flexibility. It also makes clear that courts will not tolerate huge fee increases.

Second, courts could consider the risk of loss when they assess a prevailing lawyer's basic hourly rate in the initial calculation of the lodestar figure. This approach is consistent with Blum v. Stenson, 465 U.S. 886 (1984), which held that the prevailing market rate is the appropriate rate for fixing a fee award. Id. at 894-95 & n.11. Rather than determining the prevailing

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likelihood of success).

Similarly, the 1978 class action reform bill proposed by the Justice Department provided for contingency multipliers of 2 to 3 for time before the preliminary (class certification) hearing, and of 1.75 to 2.5 for later time, subject to exceptions. S. 3475, 95th Cong., 2d Sess, § 2(a) (1978); see Wells, Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal, 16 Harv. J. Legis. 543, 547 (1979); see also Note, Adjusting Attorney Fee Awards Through Multipliers in Antitrust Class Actions, 21 Hous. L. Rev. 801, 843-44 (1984) (proposing in effect a maximum multiplier of 2).

noncontingent rate as courts customarily do, and as was done in this case, courts would calculate what a lawyer of comparable credentials and experience would charge per hour if he would receive payment only if he won the case, i.e., a market contingent rate.[19/] This method also has the advantage of treating risk consistently with other factors such as complexity, novelty, and quality of representation that are incorporated in the lodestar.

Third, the Court could retain the current individualized approach to

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19/ See Note, supra note 17, at 590-91, (relevant market for hourly rate of civil rights plaintiffs' attorneys is other contingent-fee paying clients and cases); Report, Counsel Fees in Public Interest Litigation, 39 Rec. A.B. City N.Y. 300, 317-18 (1984) (similar). There is some available information on what the fees of some contingent fee lawyers amount to per hour, but it is not broken down by the credentials of the lawyers. Dept. of H.E.W., Report of the Secretary's Comm'n on Medical Malpractice, Appendix 115 (1973) (mean hourly fee for defense lawyer was $47; mean effective hourly fee for plaintiffs', contingency fee lawyers was between $61 and $84, depending on data and assumptions).

contingency multipliers, while providing a fuller explanation of the purposes, calculation, and limits of such multipliers. See, e.g., Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 168 (1973), 540 F.2d 102, 117 (3d Cir. 1976). The lower court opinions in the case at bar show that a detailed, reasoned, restrained approach to the assessment of risk is indeed possible, and that sensible judges can avoid the imaginary threat of huge multipliers.

Petitioner's argument that the risk of loss be disregarded entirely flies in the face of economic reality, the established meaning of the words "reasonable attorney's fees" used by Congress, and the history and purposes of the attorney's fees statutes. There is disagreement about how best to factor into the calculation of attorney's fees the risk that the plaintiff's lawyer

will lose the case and receive no compensation at all for hours of devoted and skilled labor. But virtually all cases[20] and commentators[21] agree that, without recompense for that risk, no attorney's fee can be a reasonable one. Congress endorsed that view when it passed attorney's fees statutes designed to enable citizens to enforce

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20/ See authorities cited in notes 3-9, supra. This brief does not attempt to collect all the precedents supporting the inclusion of compensation for the risk of losing in attorney's fee awards, since respondent has discussed the case law in its brief.

21/ See Report of the Third Circuit Task Force, Court Awarded Attorney Fees 38 (1985) (the risk of losing "should be considered in all cases," even those "in which liability is reasonably certain to be established") (emphasis original); Report, Counsel Fees in Public Interest Litigation, 39 Rec. A.B. City N.Y. 300, 317-18 (1984); Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?, 126 U. Pa. L. Rev. 281, 324-26 (1977); Leubsdorf, supra note 9; Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 60 Harv. L. Rev. 658, 659-61 (1956); Note, supra note 17; Note, supra note 18; Note, The Contingency Factor and the Attorney's Fees Awards Act of 1976: Legislative History Requires Continued Application, 26 Santa Clara L. Rev. 193 (1986); Affidavit of Easterbrook and Sherwin, supra note 5.

complex environmental statutes such as the Clean Air Act, even though success would bring no damage award from which a lawyer could be paid. This Court too should hold that a reasonable attorney's fee includes compensation for the risk that the attorney will not be paid.

II. PETITIONER'S OBSTRUCTIVE TACTICS INCREASED THE RISK OF NONRECOVERY AND WARRANTED COMPENSATION

The risk for which the district court increased the respondent's fee award was of a special, although perhaps all-too-common kind: it resulted not from the uncertainty of the law or facts, but, as the district court found, from "numerous attempts by defendants and others to overturn or circumvent this court's Orders." 581 F. Supp. 1412, 1431 (E.D. Pa. 1984). Attorneys facing such obstruction by defendants backed by the resources of a State (which include

many of the amici here) have a special claim to receive compensation for the risk of loss they bear; the arguments against a contingency multiplier are peculiarly weak in such a case.

The district court allowed a contingency multiplier for only three of the nine phases of this case -- phases marked by efforts to frustrate the court's decree that only very wealthy and powerful defendants could mount. The defendants -- after barely avoiding a contempt finding and after obtaining one extension -- violated the decree; although the court then gave them a further extension, they prosecuted an unsuccessful appeal from that extension and the violation finding (Phase Four). The Commonwealth, taking advantage of a state statute passed to forbid its compliance with the decree, was found in contempt, and again brought an unsuccessful appeal (Phase

Five). Later, it obtained and defended authorizations from a federal agency in the hope of avoiding the sanctions provided by the district court's contempt finding (Phase Seven).[22/] Unsurprisingly, the lower courts agreed that "'[t]he defendants' presence has constantly been dominated by either a policy or an attitude that has tried to prohibit or delay the implementation of the I/M program.'" 762 F.2d 272, 276 (3d. Cir. 1985) (quoting the district court's findings, 581 F.Supp. at 1419).

Special resistance requires special remedies. Respondents faced an extraordinary risk, which made uncertain their prospects of ever being reimbursed for their extended efforts. They faced defendants able and willing to commit multiple contempt, to employ "devious formal actions," 762 F.2d at

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[22/] The plaintiffs also had to struggle with groups of would-be intervenors and a state court litigation.

281, and to fight every step of the way in and out of court. "To this day, every branch of government of the Commonwealth of Pennsylvania -- the executive, legislative, and judicial -- has fought tooth and nail every effort of plaintiff to make Pennsylvania respect the provisions of a federal statute." Id. A lawyer might well hesitate to bear the risk of overcoming such opposition if his only compensation, should he manage to prevail, would be the ordinary hourly rate he charged clients able and willing to pay at once.

Increasing the attorney's fee award because of risks caused by this kind of obstruction is a well recognized practice. See 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶16.04[2][c][iii] (1985 & 1986 Supp.). Such enhancement is not subject to the objections sometimes raised against compensating for risk. The increase gives

larger fees to cases that are strong on their merits, but rendered less likely to prevail by "tooth and nail" resistance. It makes defendants pay more when their own obstruction increases the risk that a meritorious plaintiff may not prevail. After deciding the merits, courts need not assess how likely they were to have decided it some other way, but only how likely it was that the defendant's resources and unscrupulous use of them would wear down the plaintiff before the court could implement its order. As several amici point out, see Interest of Amici Curiae, supra, such tenacious resistance by states and the federal government is not uncommon in public interest litigation.

In this case, the petitioner's lengthy resistance also imposed on counsel the risks of delay and inflation. Respondent's lawyers have still not received payment for work they

did starting in 1979. Courts have often recompensed counsel for this cost by allowing an explicit adjustment, calculating awards on the basis of counsel's hourly rates at the time of the award rather than when the services were provided, or allowing post-award interest.[23/]

The district court followed none of these practices.[24/] But precisely because it did not, the court properly took into account, as part of the risk plaintiffs' counsel bore, the risks that they would not be paid for many years, and that the value of their wages would have declined in the meantime. The defendants deliberately, "tried to prohibit or delay" compliance with the court order. 762 F.2d at 276 (quoting 581 F.Supp. at 1419). Respondent's lawyers were forced to carry a risk that is not carried by lawyers who need not wait to collect their fees until they win the case.[25/] For this reason too, the fee approved by the district court was a reasonable one.

23/ See, e.g., 2 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 16.03[9] (1985 & 1986 Supp.); Annot., 77 A.L.R. Fed. 272 (1986); cf. Library of Congress v. Shaw, 92 L.Ed.2d 250 (1986) (United States has not waived sovereign immunity from interest award on attorney's fee).

24/ The district court set "an average rate for each type of work performed during the five years" the case was litigated. 581 F.Supp. at 1421. This approximated giving lawyers rates based on the time the services were provided, without allowance for later delay or inflation.

CONCLUSION

For the public interest lawyers submitting this amicus curiae brief, the risk of nonpayment is a fact of everyday life. They stake their own incomes on the success of their clients' cases. They are prepared

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25/ Lawyers sometimes choose to delay billing their clients, but rarely for up to seven years, and much less now than in the past. See, e.g., A.B.A. Formal Ethics Opinion 338 (1974) (lawyers may charge clients interest on unpaid fees); 1 Law Office Economics & Management Manual ch. 25 (P. Hoffman rev. ed. 1985).

to live with the loss of years of effort should an important case be lost on the merits. But they should not be left to recover, when they do prevail, fees no larger than what they would charge clients who pay regardless of the outcome of their cases. Lawyers who assume the risk of loss have traditionally charged paying clients more than those who do not; courts have regarded this as indispensable to a reasonable fee; fee statutes have been construed to provide for a similar adjustment; and Congress has written fee statutes in the light of these practices. Reasonable compensation for lawyers who bear the risk of loss is essential to implement the Congressional language and purposes, to recognize economic

realities, and to maintain a healthy, competent, and upright public interest bar.

Respectfully submitted,

JOHN LEUBSDORF
Rutgers Law School
15 Washington Street
Newark, NJ 07102
201/648-5273

Attorney for Amici Curiae

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